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SUPREME COURT OF THE

OCTOBER TERM, 19

No. [illegible]

ROBERT E. WRIGHT, JR., AS MAYOR OF THE
DENVER, PLAINTIFF IN ERROR,

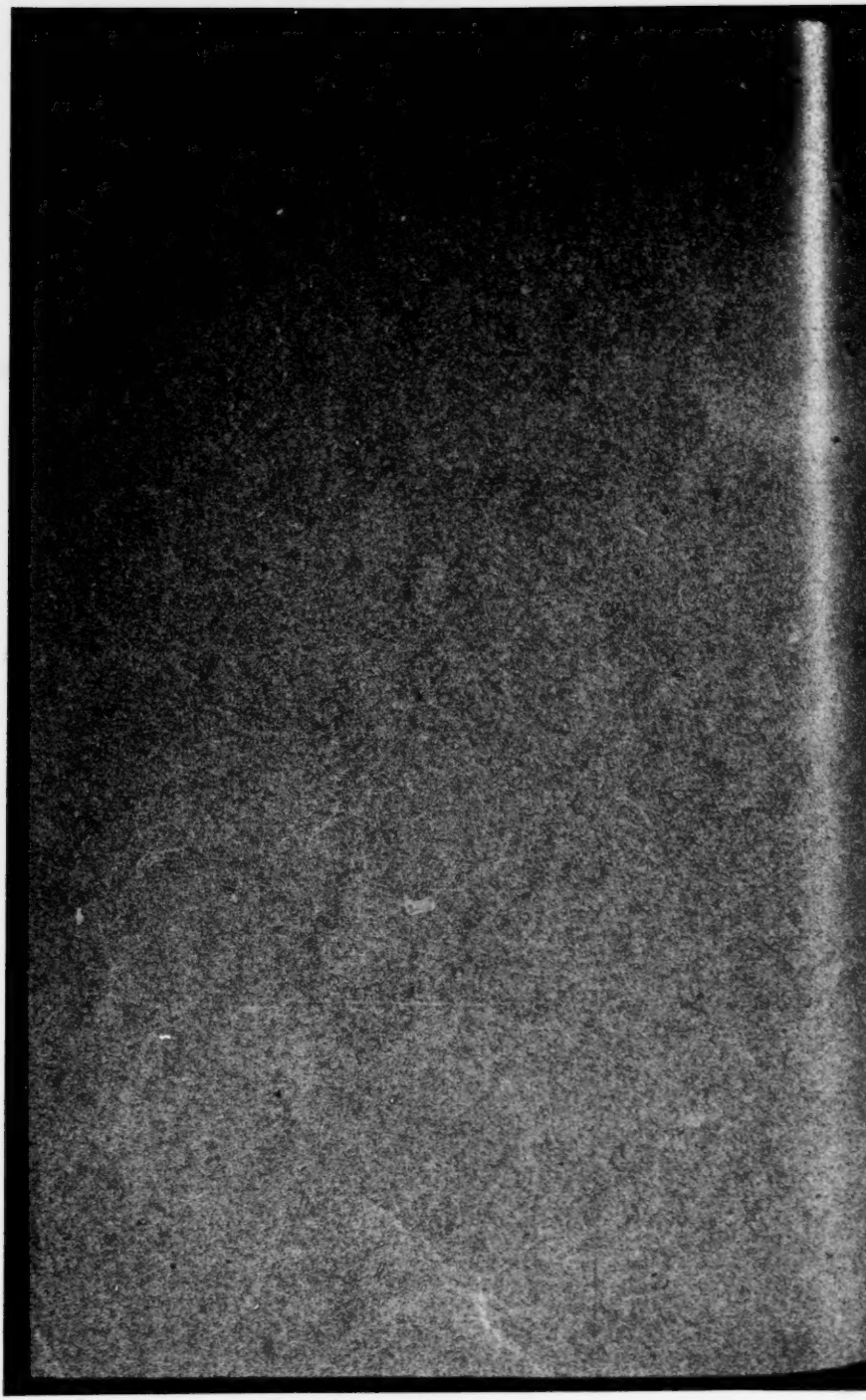
vs.

ELLEN TERESA MORGAN ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF A
FOR THE DISTRICT OF

FILED NOVEMBER 18, 1901.

(18,319.)



(18,319.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 192.

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1900, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit, the third day of December, A. D. 1900, before the Honorable Henry C. Caldwell and Honorable Amos M. Thayer, circuit judges, and Honorable Elmer B. Adams, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the fifteenth day of January, A. D. 1900, a transcript of record was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, pursuant to a writ of error directed to the circuit court of the United States for the district of Colorado, in the cause wherein Ellen Teresa Morgan, *et al.*, were plaintiffs in error and Henry V. Johnson, as mayor of the city of Denver, was defendant in error, which said transcript of record is in the words and figures following, to wit:

1 *Pleas in the Circuit Court of the United States within and for the District of Colorado, Sitting at Denver.*

Be it remembered that heretofore and on to wit: the 1st day of November, A. D. 1892, came Messrs. Benedict & Phelps, attorneys of said court and filed in said court a transcript of proceedings heretofore had in the district court of the second judicial district of the State of Colorado, sitting in and for the county of Arapahoe, in a certain cause in said district court lately pending, wherein Platt Rogers, as mayor of the city of Denver, and The City of Denver were plaintiffs, and Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, Frederick J. Chamberlin, trustee, James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, trustee, Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a corporation, Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, trustee, C. H. Brierly, trustee, S. Rose, Charles L. McIntosh, trustee, James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, partners as McIntosh & Mygatt, Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a corporation, Cyrus G. Richardson and Samuel B. Morgan were defendants.

And the said transcript is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of Arapahoe, }

District Court, County of Arapahoe.

Pleas in the district court of Arapahoe county, State of Colorado, in the first division thereof, before the Honorable John A. Bentley, one of the judges of the second judicial district of the said State, at a term thereof begun and held at the court-house, in Denver, in said county, on the second Tuesday (it being the 13th day) of September, A. D. one thousand eight hundred and ninety-two.

Present: Honorable John A. Bentley, one of the judges of the district court. Robert W. Steele, Esq., district attorney of said district. William K. Burchinell, Esq., sheriff of said county. Matt Adams, Esq., clerk of said court.

PLATT ROGERS, Mayor, etc., }
vs. } 17281.
CHARLES B. WOOD ET AL. }

Be it remembered, that heretofore and on to wit, the 1st
2 day of September, A. D. 1892, came the plaintiffs by F. A. Williams, Esq., their attorney and filed herein their complaint.

And said complaint is in words and figures as follows, to wit:

In the District Court of Arapahoe County, Colorado.

PLATT ROGERS, as Mayor of the City of Denver, and The City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD, EDWARD P. SHAW, LEVERETT F. Englesby, Frederick J. Chamberlin, Trustee; James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, Trustee; Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a Corporation; Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, Trustee; C. H. Brierly, Trustee; S. Rose, Charles L. McIntosh, Trustee; James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, Partners as McIntosh & Mygatt; Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a Corporation; Cyrus G. Richardson, and Samuel B. Morgan, Defendants. } Complaint.

The plaintiffs complain of the defendants, and for cause of action allege:

1. That the plaintiff, Platt Rogers, is and ever since the 18th day

of April, A. D. 1891, has been the duly elected, qualified and acting mayor of the city of Denver.

2. That by virtue of an act of Congress of the United States of America, approved on the 21st day of May, A. D. 1872, patent of the United States bearing date November 15th, A. D. 1873, was duly issued, conveying to Joseph E. Bates, mayor of the city of Denver and to (*its*) successors and assigns forever, the following lands in Arapahoe county aforesaid, to wit: the northwest quarter of the southwest quarter of section one (1) the southwest quarter of the northeast quarter and the north half of the southeast quarter of section two (2) all in township four (4) south, range sixty-eight (68) west; in trust for the city of Denver; which patent was on the 26th day of March, A. D. 1875, recorded in Book 76, at page 52, of the official records, in the office of the recorder of deeds, in and for Arapahoe county, aforesaid.

3. That ever since the 15th day of November, A. D. 1873,
3 the legal title in fee-simple to said lands has been vested in the mayor of the city of Denver, in trust as aforesaid; and that said The City of Denver has during all of said time been, and now is legally entitled to occupy and possess said lands for the purposes of a city cemetery and public park.

4. But that, nevertheless, while the plaintiff, Platt Rogers, as mayor of the city of Denver, was such owner in fee-simple, and so seized of said lands and premises, and while the city of Denver was so entitled to occupy and possess said lands as aforesaid the defendants, Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, Frederick J. Chamberlin, trustee, James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, trustee, Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a corporation, Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, trustee, C. H. Brierly, trustee, S. Rose, and Charles L. McIntosh, trustee, did, on the 1st day of August, A. D. 1892, enter into and upon and occupy that portion of said lands described as follows, to wit: the south half of the northeast quarter of the southeast quarter of section two (2), township four (4) south, range sixty-eight (68) west aforesaid, and ever since said date have wrongfully withheld and still withhold the possession of said premises from the plaintiffs, and exercise acts of ownership in or over the same; and that said defendants, James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, partners as McIntosh & Mygatt, Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a corporation, Cyrus G. Richardson, and Samuel B. Morgan, claim some title to or interest in said premises adversely to the plaintiffs; to the damage of the plaintiffs in the sum of one thousand dollars.

Wherefore, plaintiffs pray judgment against the defendants for the recovery of the possession of said premises and for the sum of

one thousand dollars damages for withholding the possession thereof and they also pray judgment for their costs.

F. A. WILLIAMS,
Attorney for Plaintiffs.

STATE OF COLORADO, }
County of Arapahoe, } ss:

F. A. Williams, being by me first duly sworn, on oath deposes and says: I am the attorney for The City of Denver, one of the plaintiffs in the action above mentioned. I have read the foregoing complaint, and know the contents thereof and the same is true to the best of my knowledge, information and belief.

F. A. WILLIAMS.

4 Subscribed and sworn to before me this 1st day of September, 1892.

My commission expires March 16, 1896.

[SEAL.] HENRY F. JOLLY,
Notary Public.

Indorsed: 17281. In district court. Platt Rogers, mayor, *et al.*, *vs.* Charles B. Wood *et al.* Complaint. Filed in district court, Arapahoe Co., Colo., Sep. 1, 1892. Matt Adams, clerk. F. A. Williams, att'y for pl'ffs.

And thereupon, summons issued out of said court, directed to the said defendants.

And said summons, with the return of the sheriff thereon, is in words and figures as follows, to wit:

STATE OF COLORADO, *County of Arapahoe,* } ss:

In the District Court.

PLATT ROGERS, as Mayor of the City of Denver, and The City of Denver, Plaintiffs,

vs.

CHARLES B. WOOD, EDWARD P. SHAW, LEVERETT F. Englesby, Frederick J. Chamberlin, Trustee; James Pickard, H. H. Bryant, T. N. Chapman, Humphrey B. Chamberlin, Trustee; Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a Corporation; Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, Trustee; C. H. Brierly, Trustee; S. Rose, Charles L. McIntosh, Trustee; James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, Partners as McIntosh & Mygatt; Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a Corporation; Cyrus G. Richardson, and Samuel B. Morgan, Defendants. } Summons.

The People of the State of Colorado to Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, Frederick J. Chamberlin, trustee; James Pickard, H. H. Bryant, T. M. Chapman, Humphrey J. Chamberlin, trustee; Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a corporation; Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, trustee; C. H.
5 Brierly, trustee; S. Rose, Charles L. McIntosh, trustee; James Nichols, James A. Skinner, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, partners as McIntosh & Mygatt; Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, A. S. Weston, The City National Bank, a corporation; Cyrus G. Richardson, and Samuel B. Morgan, the defendants above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiffs, in the district court of Arapahoe county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or, if served out of this county or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint; and if a copy of the complaint in the above-entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time hereinbefore

specified for the appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover possession of the south half of the northeast quarter of the southeast quarter of section two (2), township four (4) south, range sixty-eight (68) west, in said Arapahoe county, and State of Colorado, for $1,000, damages for withholding the possession thereof, and for costs, as will more fully appear from the complaint in said action, to which reference is here made, a copy of which complaint is hereto attached and herewith served.

And you are hereby notified that if you fail to appear, and to answer to the said complaint as above required, the said plaintiffs will take judgment against you according to the prayer of said complaint.

Given under my hand and the seal of said court at Denver, in said county, this 1st day of September, A. D. 1892.

[SEAL.] MATT ADAMS, *Clerk*,
By J. F. BELFORD,
Deputy Clerk.

STATE OF COLORADO, } ss:
County of Arapahoe, }

I do hereby certify that I have duly served the within summons, together with a copy of the complaint, in the within stated action, upon the following persons and upon the following days respectively, to wit:

On September 7th, 1892, I delivered a true copy of said complaint and summons personally to each of the following-named de-
6 fendants, to wit: Silas C. Fulton, John R. Hanna, John R. Hanna, president of the City National Bank, W. H. Chamberlin, treasurer of the Chamberlin Investment Company, Julius A. Myers, Samuel B. Morgan, Robert S. Roeschlaub, Cyrus G. Richardson, Margaretta G. Rice, Clara N. Bristol, S. Rose, and W. R. Mygatt, in the county of Arapahoe and State of Colorado.

On the 8th day of September, 1892, I served a true copy of said complaint and summons upon each of the following defendants in person, in said county and State, namely, Frederick J. Chamberlin and Charles H. Brierly.

On the 8th day of September, 1892, I served a true copy of said complaint and summons personally on each of the following-named persons, who accepted service for each of the following-named defendants, respectively, to wit: To W. R. Mygatt for Charles L. McIntosh; to Julius A. Myers for Horace W. Bennett; to Frederick J. Chamberlain for H. B. Chamberlin and Alfred H. Chamberlin; to Frederick J. Chamberlin for James Nichols and James H. Williams; to C. H. Brierly for Henry Hislop and William Sumner; and to J. B. Church for William Church.

On the 8th day of September, 1892, I served a true copy of said complaint and summons upon the defendant, Robert C. Fisher by delivering a true copy of said complaint and summons to Martha Miles Fisher, wife of said Robert C. Fisher, a member of his family

over the age of fifteen years, at his usual place of abode and place of residence, in said county and State.

After diligent search I am unable to find the following-named defendants, namely: Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, James Pickard, H. H. Bryant, J. M. Chapman, James A. Skinner, Frank E. Harrington, Mary C. Rockwell, A. S. Weston, and Jennie C. B. Reynolds, and as to said last-named defendants I now return this summons *non est inventus*, this 16th day of September, A. D. 1892.

W. K. BURCHINELL, *Sheriff*,
By W. F. M. LYON, *Deputy*.

Sheriff's Fees.

Service..... $
Mileage.....
Return.....

Total ..... $

Filed this 16th day of September, A. D. 1892.

Indorsed: No. 17281. Summons and complaint. Platt Rogers, as mayor of the city of Denver and The City of Denver, pl'ffs, 7 *vs.* Charles B. Wood *et al.*, def'ts. State of Colorado, county of Arapahoe—*ss.* Office of the sheriff of said county, Sept. 3rd, A. D. 189–. I hereby certify that I received the within summons on the 3rd day of September, 1892, at — o'clock p. m. W. K. Burchinell, sheriff, by W. F. M. Lyon, deputy. Filed in district court, Arapahoe Co., Colo., Sep. 19, 1892. Matt Adams, clerk. F. A. Williams, attorney for pl'ffs.

And afterwards, and on to wit: the 27th day of September, A. D. 1892, came defendant Samuel B. Morgan, by Messrs. Teller, Orahood & Morgan, and filed herein his demurrer to the plaintiffs' complaint.

And said demurrer is in words and figures as follows, to wit:

STATE OF COLORADO, } *ss*:
County of Arapahoe, }

In the District Court.

PLATT ROGERS, Mayor of the City of Denver, *et al.*, Plaintiffs, *vs.* CHARLES B. WOOD ET AL., Defendants. } No. 17281. Div. I.

Demurrer to Complaint.

Now comes Samuel B. Morgan, one of the defendants in the above-entitled action, and demurs to the plaintiffs' complaint herein, and for cause of such demurrer, alleges that the said complaint does

not state facts sufficient to constitute a cause of action against this defendant.

TELLER, ORAHOOD & MORGAN,
Attorneys for Defendant Samuel B. Morgan.

Indorsed: No. 17281 div. 1, dist. court. Platt Rogers, mayor etc., *vs.* Chas. B. Wood *et al.* Demurrer Sam'l B. Morgan to complaint. Filed in district court, Arapahoe Co., Colo., Sep. 27, 1892. Matt Adams, clerk. Teller, Orahood & Morgan, attorneys for Sam'l B. Morgan.

And afterwards, and on to wit, the 27th day of September A. D. 1892, came defendants Margaretta G. Rice, C. G. Richardson and John R. Hanna, trustee, by Charles H. Burton, their attorney, and filed herein their demurrer to plaintiffs' complaint.

And said demurrer is in words and figures as follows, to wit:

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

In the District Court of said County.

PLATT ROGERS, as Mayor of the City of Denver, and The City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD ET AL., Defendants.
} Demurrer.

Come now the defendants, Margaretta G. Rice, Cyrus G. Richardson and John R. Hanna, trustee, by their attorney Charles H.
8 Burton, and demur to the complaint of the plaintiffs, in the above-entitled action, for and upon the following grounds and reasons, to wit:

First. That there is a misjoinder of parties plaintiff in this, that it appears from said complaint that the plaintiffs have no joint legal estate right, title or interest in or to the premises mentioned and described in said complaint also in this, that it appears from said complaint that the plaintiff, Platt Rogers, as mayor of the city of Denver, has no right, title or interest in or to said premises.

Second. That the plaintiff, Platt Rogers, as mayor of the city of Denver, has no legal capacity to sue.

Third. That said complaint does not state facts sufficient to constitute a cause of action against the defendants Rice, Richardson and Hanna, or against any of them, or either one of them, in favor of the plaintiffs.

CHARLES H. BURTON,
Att'y for Def'ts Rice, Richardson, and Hanna.

Indorsed: No. 17281. Platt Rogers, as mayor of the city of Denver, *et al. vs.* Charles B. Wood *et al.* Demurrer of Rice, Richardson & Hanna. Filed in district court, Arapahoe county, Colo., Sep. 27, 1892. Matt Adams, clerk. Chas. H. Burton, att'y for def'ts Rice Richardson and Hanna.

And afterwards, and on to wit, the 27th day of September A. D. 1892, came the petitioner by Messrs. Teller, Orahood & Morgan his attorneys and filed herein his petition and bond for removal of this cause to the United States court.

And said petition is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of Arapahoe. }

In the District — of Arapahoe County.

PLATT ROGERS, as Mayor of the City of Denver, Plaintiff, }
vs.
SAMUEL B. MORGAN ET AL., Defendants. }

Petition to Remove This Case to the United States Circuit Court.

To the honorable the district court of Arapahoe county, State of Colorado:

Your petitioner, Samuel B. Morgan, respectfully shows that he is one of the defendants, in the above-entitled suit, that the matter in dispute thereof exceeds, exclusive of interest and costs, the sum of two thousand dollars.

Your petitioner further shows that said suit is of a civil
9 nature for the recovery of certain real estate in the city of Denver and for one thousand dollars damages alleged to have accrued by reason of the detention of the same.

And your petitioner further shows that in the said above-mentioned suit, there is a controversy involving the construction of a statute of the United States, to wit, an act entitled An act to enable the city of Denver to purchase certain land in Colorado for a cemetery approved May 21, 1872.

And your petitioner offers herewith a bond with good and sufficient surety in the penal sum of five hundred dollars, conditioned for his entering in the circuit court of the United States for the — district of Colorado on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to proceed no further herein, except to make an order of removal as required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States within and for the — district of Colorado, according to the statute in such case made and provided.

And your petitioner will ever pray etc.

S. B. MORGAN,
By his att'y-in-fact, E. B. MORGAN.
TELLER, ORAHOOD & MORGAN,
Attorneys for Petitioner.

Indorsed: Gen. No. 17281. Term No. —. District court of Arapahoe county. Platt Rogers as mayor *et al. vs.* Chas. B. Wood *et al.* Petition for removal of cause under act of 1887, between citizens of different States. Filed in district court, Arapahoe Co., Colo., Sep. 27, 1892. Matt Adams, clerk. Teller, Orahood & Morgan, attorneys for petitioner.

And said bond is in words and figures as follows, to wit:

Know all men by these presents, that we, Samuel B. Morgan, of the city of Denver, county of Arapahoe, State of Colorado as principal and Edward B. Morgan and Willard Teller of the city of Denver in the county of Arapahoe and State of Colorado as surety, are held and firmly bound unto Platt Rogers as mayor of city of Denver and the City of Denver and all other persons whom it may concern, in the penal sum of five hundred dollars, lawful money of the United States for the payment of which well and truly to be made, we bind ourselves and our heirs, executors or administrators, jointly and severally and firmly by these presents.

10 Whereas, Samuel B. Morgan principal above named, has petitioned the district court of Arapahoe county, in the State of Colorado, for the removal of a certain suit therein pending, wherein Platt Rogers, as mayor of the city of Denver and The City of Denver *is* plaintiff- and the said Samuel B. Morgan is one of the defendants into the circuit court of the United States for the — district of Colorado.

Now therefore, the condition of this obligation is such that if the above-bounden Samuel B. Morgan shall enter in such circuit court of the United States on the first day of its next session a copy of the record in such suit and shall pay all costs that may be awarded by said circuit court, if said circuit court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear in said circuit court and enter special bail in said cause if special bail was originally required therein and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the United States court, then this obligation to be void, otherwise of force.

Witness, our hands and seals, this 27th day of Sept. 1892.

SAMUEL B. MORGAN,
By E. B. MORGAN, [SEAL.]
Att'y-in-fact.
WILLARD TELLER. [SEAL.]
EDWARD B. MORGAN.

Indorsed: Gen. No. 17281. Term No. —. District court of Arapahoe county. Platt Rogers as mayor, *et al. vs.* Chas. B. Wood *et al.* Removal of cause—Bond. Filed in district court, Arapahoe Co., Colo., Sept. 27, 1892. Matt Adams, clerk. Teller, Orahood & Morgan, attorneys for petitioner.

And afterwards, and on to wit, the 22nd day of October, A. D. 1892, the same being one of the regular juridical days of the September term, 1892, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

PLATT ROGERS, Mayor, etc., *vs.* CHARLES B. WOOD ET AL. } 17281. Ejectment.

At this day come the said defendants by their attorney E. M. Morgan, Esq., and the said defendants having heretofore presented and filed their petition for the removal of this cause to the circuit court of the United States for the district of Colorado, and having also on the same day filed their bond for such removal and the court having considered the same,

11 It is ordered by the court that the said petition and bond be and they are hereby approved, and that this action be and the same hereby is removed to the said circuit court and let the clerk of this court make a transcript of the papers in this behalf together with all orders had and entered of record herein and certify the same to said circuit court of the United States for the district of Colorado, with all convenient speed upon the payment of all costs remaining due in this action.

STATE OF COLORADO, *County of Arapahoe,* } *ss:*

I, Matt Adams, clerk of the district court of Arapahoe county, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of complaint, summons, demurrers of defendants, petition and bond for removal and order of court, had and entered of record in a certain cause in said court lately depending wherein Platt Rogers, as mayor and City of Denver were plaintiffs, and Charles B. Wood *et al.* were defendants, as the same now remains on file and of record in this office.

Witness my hand and seal of said court, at the court-house in Denver, county and State aforesaid, this 27th day of October, A. D. 1892.

[SEAL.]

MATT ADAMS, *Clerk*,
By G. S. RICHARDS,
Deputy Clerk.

Indorsed: 2854. U. S. circuit court. Platt Rogers, mayor, *et al.*, *vs.* Charles B. Wood *et al.* Transcript. Filed Nov. 1, 1892. Robert Bailey, clerk. Teller, Orahood & Morgan, def'ts' att'ys.

In the Circuit Court of the United States, District of Colorado.

PLATT ROGERS, Mayor of the City of Denver, *et al.*, Complainants,
vs.
CHARLES B. WOOD, SAMUEL B. MORGAN, ET AL., Defendants.

The said defendant Samuel B. Morgan, answering the complaint of the plaintiffs herein admits that said plaintiff was at the time of the commencement of this suit the mayor of the city of Denver as in said complaint set forth.

Second. Admits that by virtue of an act of Congress, approved on the 21 day of May, 1872, a patent of the United States, bearing date the 15th day of November, 1873, was duly issued, conveying to Joseph E. Bates, mayor of the city of Denver, and to his successors and assigns forever, the lands described in the complaint herein, and admits that the said patent was recorded on the 26th
12 day of March, 1875, in Book 72, at page 52, of the records of deeds of Arapahoe county aforesaid.

Third. Admits that from the 15th day of November, 1873, and until some time thereafter, to wit: until the same was conveyed away by deed, the legal title in fee-simple to said lands was vested in the mayor of the city of Denver; denies that it was in trust, as set forth in the complaint, and denies that the City of Denver is now legally entitled to occupy and possess the said lands for the purposes of a city cemetery and public park or either of them.

Fourth. This defendant, further answering, admits that the said defendants in said complaint mentioned did before and at the time mentioned in said complaint enter into and occupy that portion of the said lands in said complaint described, to wit: the south half of the northeast quarter, the southeast quarter of section 2, township four, south of range sixty-eight west, and admits that they do still withhold the possession of said premises from the said plaintiff; and admits that the said defendant, Samuel B. Morgan, claims title and interest in the said premises adversely to the plaintiff, as hereinafter set forth.

And this defendant, further answering says, that on the 21st day of May, 1872, the Congress of the United States passed an act entitled, "An act to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes;" which said act was in the words and figures following:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That the mayor of the city of Denver, Colorado Territory be and he is hereby authorized to enter through the proper land office at the minimum price per acre the following lands belonging to the United States, to wit: the northwest quarter of the southeast quarter of section number one, and the southwest quarter of the southeast quarter and the north half of the southeast quarter of section number two, in township number four south, in range number sixty-eight west of the sixth principal meridian, in the Territory of Colorado, being 160 acres of land, lying adjacent to the city of Den-

ver, to be held and used as a burial place for the said city and vicinity.

Approved May 21, 1872."

And that a patent was issued by the Government of the United States to Joseph E. Bates, mayor of the city of Denver, which said patent was in the words and figures following:

"To all to whom these presents shall come, Greeting:

Certificate No. 2044. Whereas Joseph E. Bates, mayor, in trust for the city of Denver, C. T., has deposited in the General
13 Land Office of the U. S. a certificate of the register of said office at Denver city C. T., whereby it appears that full payment has been made by said Bates, mayor in trust for the city of Denver, according to the provisions of the act of Congress of the 24th of April, 1820, entitled An act making further provision for the sale of the public lands for the N. W. ¼, S. W. ¼, sec. 1; the S. W. ¼, N. E. ¼, and the N. ½ S. E. ¼ sec. 2, tp. 4, S. R. 68, W., in the district of lands subject to sale at Denver city, C. T. containing 160 acres according to the official plat of the survey of the said lands returned to the Gen. Land Office by the surveyor general, which said tracts have been purchased by the said Bates mayor in trust for said city.

Know ye that the U. S. A. in consideration of the premises and in conformity with the several acts of Congress in such case made and provided have given and granted and by these presents do give and grant unto the said Bates, mayor in trust for said city and to his successors the said tracts above described, to have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto said Bates, mayor in trust for the city of Denver, and to his successors and assigns forever, subject to any vested and accrued water rights for mining, agricultural or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local custom-, laws and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted as provided by law.

In testimony whereof, I, U. S. Grant, President U. S. A. have caused these letters to be made patent and the seal of the Gen. Land Office to be hereunto affixed. Given under my hand at the city of Washington, the 15th day of November, 1873, and of the Independence of the U. S. the 98th.

By the President:

[SEAL U. S.]

U. S. GRANT,
By Z. B. STURGES, *Ass't Sect.*

Rec. vol. 4, page 329.

L. K. LIPPINCOTT,
Rec. Gen. L. Office."

That immediately after the obtainment of said patent, and on or about the 28th day of October, 1872, Joseph P. Machebeuf, who was

then the bishop of the Catholic church for the diocese of Den-
14 ver, filed a petition to the honorable the mayor and the common council of the city of Denver; which said petition was in the words and figures following, to wit:

"To the honorable the mayor and common council of the city of Denver:

Your petitioner Joseph P. Machebeuf, Catholic bishop of Denver, respectfully represents to your honorable body on his own behalf and on that of the Catholic church of Denver and Arapahoe county, that some time in the year 1863 he purchased for the sum of $200 from one John I. Walley, the following-described piece of land situate in said county of Arapahoe, viz., the N. E. ¼ of the S. E. ¼ of sec. 2, T. 4, S. R. 68 W.; and that from the time of said purchase and since hitherto said piece of land has been used and still is used by the members of said Catholic church of Denver and Arapahoe county as a burial place, and that a great number of their dead are therein buried. And your petitioner further represents that having been informed that the city of Denver has procured from the Government of the U. S. a patent of a certain piece of land including the piece hereinbefore described to be used as a cemetery, he fears some measures may be taken by your honorable body to lay out and arrange the entire piece of land conveyed as aforesaid to the city of Denver, whereby the disposition and arrangement of said piece hereinbefore described might be greatly disturbed and (interefered) with to the detriment of the said members of the Catholic church in regard to the said land so used by them as a place of burial;

Wherefore your petitioner humbly prays that your honorable body may instruct a good deed of conveyance to be made on the part of said city of Denver by whomsoever is lawfully empowered in granting and conveying the fee of said piece of land hereinbefore described unto your petitioner as Catholic bishop aforesaid and to his successors in office forever, and your petitioner will ever pray etc.

JOSEPH P. MACHEBEUF,
Bishop of Denver,
By EDWARD L. JOHNSON,
His Att'y-in-fact.

Denver, Oct. 28, 1872."

That such proceedings were afterwards had on said petition, that on the 4th day of December, 1873, the committee which had been appointed for that purpose reported to the said common council of the city of Denver and to the mayor thereof in the words and figures following:

"To the honorable mayor and council:

Your committee find on examination that within parties had rights previous to the city and would recommend that the
15 prayer of the petitioner be granted and the mayor in behalf of the city of Denver is authorized to make them their deed

provided they pay into the city treasury the cost of the land and which means all actual (—) which the city of Denver has been to in obtaining Government title, all of which is respectfully submitted.

M. D. CLIFFORD.
A. McNAMEE.
A. WOEBER.

Denver, C. T., Dec. 4th, 1873."

That afterwards, and on the 8 day of January, 1874, the committee of public grounds and buildings for the city of Denver, to whom said petition had been referred, reported in the words following:

The committee on public grounds and buildings with the city attorney, to whom was referred the petition of the Rt. Rev. Jos. P. Machebeuf, bishop of the Roman Catholic church of colorado, submitted the following report:

DENVER, C. T., *Jan.* 8, 1874.

To the hon. mayor and city council of the city of Denver:

Your committee would report that they have examined the foregoing petition and would recommend that the prayer of the petitioner be granted.

J. M. BROADWELL,
J. W. BARKER,
M. BENEDICT, *Committee.*

That in pursuance of said recommendation and vote of said city council of the city of Denver the mayor thereof did on the 6 day of February 1874, (made,) execute and deliver to said Joseph Machebeuf, as aforesaid a deed to said property, which is in the words following:

"This deed made this sixth day of February in the year of our Lord one thousand eight hundred and seventy-four between the City of Denver by Francis M. Case, its mayor, of the county of Arapahoe and Territory of Colorado, of the first part, and the Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, of the county of Arapahoe, Territory of Colorado of the second part, witnesseth that the said party of the first part for and in consideration of the sum of fifty dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised released sold conveyed and quitclaimed and by these presents do- remise, sell, convey and quitclaim unto the said parties of the second part, his heirs and assigns forever, all the right, title, interest, claim and demand which
16 the said first party has in and to the following-described real estate situate, lying and being in the county of Arapahoe and Territory of Colorado, to wit, the northeast one-fourth of the southeast one-fourth of section two, township four, south of range sixty-eight west. This deed is made by order of the city council of the city of Denver.

To (*hand*) and to hold the same together with all and singular the appurtenances and privileges thereto belonging or in anywise thereto appertaining, and all the estate, right, title, interest and claim whatsoever of the said party of the first part either in law or equity to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever, for the purposes aforesaid.

In witness whereof the said party of the first part, by Frances M. Case its mayor, has hereunto set (*his*) hand and seal the day and year above written.

THE CITY OF DENVER, [SEAL.]
By FRANCES M. CASE,
Mayor of Denver.

Signed, sealed and delivered in presence of—
—— ——.

The erasure in the description and trustee was made before execution.

—— ——, *City Clerk.* [CITY SEAL.]

TERRITORY OF COLORADO, } ss:
County of Arapahoe, }

I, Mitchell Benedict, a notary public in and for said county in the Territory aforesaid do hereby certify that Frances M. Case, mayor of said city of Denver, who is personally known to me as the person whose name is subscribed to the annexed deed appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth. Given under my hand and notarial seal this sixth day of February, A. D. 1874.

MITCHELL BENEDICT,
[NOTARIAL SEAL.] *Notary Public.*"

That said deed was thereupon delivered to the said Machebeuf and was afterwards, on to wit, the 7 day of February, 1874, recorded in the records of Arapahoe county, State (then Territory) of Colorado, and the said Machebeuf, being then in the possession of said property, and having been in the possession thereof since the date mentioned in his said petition, and before that time, continued in the possession thereof and that said ground was used as a place of burial for members of the Catholic church from that time up until some time about the year 1887, such burials having all been made in the north half of said tract, when on account of the proximity
17 of said burial place to the residence portion of the city of Denver, the subject of burials in that place became a matter of public discussion in the newspapers and elsewhere, the newspapers and others interested in the health of the city insisting that the time had come when burials at that place should be discontinued, and they were discontinued; and subsequently by resolution

of the board of health, a department of the city council, burials in said grounds were prohibited; said resolution bearing date August —, 1892.

That, by the laws of its organization as it existed in 1873, it was provided by section third of the act of 1866 as follows:

Whenever any tract of land adjoining the city of Denver shall be laid off into town lots, platted and duly recorded, as may be required by law, the same shall be annexed to and become a part of the city of Denver.

SECTION FOUR. The inhabitants of the said city, by the name and style aforesaid through and by the said city council, shall have power and authority to purchase, hold, possess and enjoy both real and personal property for city hall, jail, public grounds and for other public purposes, and shall have power and authority to sell and convey the same; and may also, for the use of the inhabitants of the said city, purchase, hold, possess and enjoy real property beyond the limits of said city for burying grounds and cemeteries and improve the same.

SECTION FIVE. The inhabitants of said city, by the name and style aforesaid, shall have power and authority, and they are hereby empowered and authorized to take and hold, possess, use and enjoy both real and personal property by deed, grant, gift, bequest, devise or otherwise; and they shall have the power, through and by the city council, to sell and convey the same for the sole use and benefit of the inhabitants of said city.

And this defendant further shows that after the acquisition of title to the above-described land by Samuel B. Morgan, the Congress of the United States did on the 25 day of January, 1890, pass an act in the words and figures following, to wit:

"A bill to amend an act to enable the city of Denver to purchase certain land for cemetery purposes.

Whereas, at the second session of the Forty-second Congress an act approved May 21st, 1872 (17th Stat. at Large, page 140) entitled

'An act to enable the city of Denver to purchase certain lands
18 in Colorado for a cemetery' erroneously described a tract of land as the northwest quarter of the southwest quarter of section one and the north half of the southeast quarter of section two, and the southwest quarter of the southeast quarter of section two, township four south, range sixty-eight west, sixth principal meridian; and

Whereas the city of Denver has paid for and received a patent for the northwest quarter of the southwest quarter of section one and the north half of the southeast quarter of section two, township four south, range 68 west 6th P. M., which latter is correct and in accordance with the land actually occupied by the said city of Denver for a cemetery.

Therefore be it enacted by the Senate and House of Representatives of the U. S. A. in Congress assembled:

That an act entitled 'An act to enable the city of Denver to pur-

chase certain lands for a cemetery' approved May 21, 1872, be and the same is hereby amended as follows, strike out the words 'the southwest quarter of the southeast quarter' and insert in lieu thereof the words 'the southwest quarter of the northeast quarter' so that the description of the said land in the said act shall read 'the N. W. ¼ of the S. W. ¼ of sec. 1 and the N. ½ of the S. E. ¼ of sec. 2 and the S. W. ¼ of the N. E. ¼ of sec. 2, T. 4, S. R. 68 W., 6th P. M.'

SEC. 2. That the U. S. patent issued Nov. 15, 1873, conveying the N. W. ¼ of the S. W. ¼ sec. 1, and the S. W. ¼ of the N. E. ¼ sec. 2, and the N. ½ of the S. E. ¼ of sec. 2, tp. 4, S. R. 68, W., 6th P. M., in the Territory of Colorado, to Joseph E. Bates, mayor of the city of Denver, and to his successors and assigns forever, be and the same is hereby approved and confirmed. That the said city of Denver be, and it is hereby authorized to vacate the use of the said land or any portion thereof as a cemetery, and to appropriate the use of the same for a public park or grounds, and to no other purpose."

That afterwards, and on the 25th day of April, 1887, the said Machebueg made, executed, acknowledged and delivered to the said Samuel B. Morgan the property mentioned in said complaint, to wit: the south half of the northwest quarter of the southeast quarter of section two, township four, south of range sixty-eight west, in the county and State aforesaid, the said Morgan then and there paying the said Machebeuf as the purchase price of said property the sum of twenty thousand dollars. That before said time, and on, to wit: the 31st day of March, 1885, the said Machebeuf had sold and conveyed to the Colorado Catholic Loan & Trust Association the said property described in the said patent from the Government to said city of Denver, to wit: that portion which included and covered the ground mentioned in said complaint. That the said Samuel
19 B. Morgan did, for the purpose of perfecting said title to said property, procure from said The Colorado Catholic Loan & Trust Association, to whom the property had been conveyed as aforesaid, on the 2nd day of May, 1887, a deed to the said property, to wit: said property described in said complaint. That thereupon, to wit: on the said 2nd day of May, 1887, said Samuel B. Morgan did enter upon and take possession of said property under his said deed from said Machebeuf and the said The Colorado Loan & Trust Association, and did proceed at once under claim and color of title derived from said deeds to lay out and subdivide said lands and plat said lands as an addition to the city of Denver in accordance with the laws in such cases made and provided, and did then and there while in the peaceable and undisputed possession of said lands, make a survey and plat thereof, and platted and subdivided the same into lots and blocks, with streets and alleys, platting the same as Morgan's Capitol Hill subdivision, and did then and there file the said map or plat in the office of the clerk and recorder of Arapahoe county, dedicating the said streets and alleys of the said subdivision to the public, such streets, alleys and blocks in said subdivision being by him marked and designated and marked upon the ground at the time of the filing of the map thereof, to wit:

on the 10th day of June, 1887. That thereupon, he (the said Morgan) did proceed to sell and convey portions of said lands in controversy, to wit: a large number of lots to different parties named as his codefendants in said complaint and all of the said defendants herein claimed by, through or under the said defendant Morgan, by virtue of said conveyance by the said Machebeuf and the Colorado Catholic Loan and Trust Association, and have acquired color of title under said deeds and under said deed of this defendant.

This defendant further shows, that during all of said period since the 10th day of June, 1887, up to the time of the commencement of this suit, to wit: September 1, 1892, the said city of Denver and the said county of Arapahoe did cause to be levied upon said lots and all of them contained in said subdivision, to wit: the lands described in said complaint, being the ones deeded to the said Morgan taxes for each and every year to wit: for the taxes of 1888, 1889, 1890, and 1891, which said taxes amounted to the sums following, to wit: for the year 1888, $607.39; for the year 1889, $597.11; for the year 1890, $600.56, and for the year 1891, $682.15, all of which said sums were paid by the said Samuel B. Morgan because of his alleged ownership of said property.

This defendant further shows, that in the year 1892, the said city of Denver refused to allow any taxes to be levied on said
20 property, and that as this defendant avers and believes, said failure and neglect to levy taxes for said year was because the city of Denver feared that by so doing the title to said lands would become complete and perfect in said Samuel B. Morgan under the laws of the State of Colorado, at that time and now existing.

This defendant says that he has been at all times ready and willing to pay in full the taxes for said year 1892, and for all subsequent years so far as he has remained the owner of said property; and this defendant avers that by reason of said fact and under and in pursuance of the laws of the State of Colorado, having paid all the taxes which were assessed against the property for the period of five years, and being then in the possession of said property under and by virtue of color of title of record in said county, said plaintiff is estopped from asserting any claim or title to said property, and this defendant, his codefendant, ought to be held and adjudged the legal owner of that portion of said property in controversy, to wit: the property for which this action is brought.

This defendant, further answering, says: *actio non*, because he says that at and prior to the 10th day of June, 1887, and ever since then, the said Samuel B. Morgan had to all of said property mentioned in said complaint color of title, which color of title was made in good faith to said tract, the same being then vacant and unoccupied land, he, the said Morgan, having on said last-mentioned date mapped, surveyed, platted and laid out the said tract of land in lots and blocks with streets and alleys subdividing the same, under the name of Morgan's Capitol Hill subdivision to the city of Denver, the streets and alleys being dedicated by said plat to the public, and that he, said Morgan, had held such title to said property for more

than five years before the commencement of this suit and had paid all taxes which had been assessed against said land during said five or for any other years (*years*), and had paid upon said lands by way of taxes the sum of $607.39 for the year 1888; the sum of $597.11 for the year 1899; the sum of $600.56 for the year 1890, and the sum of $682.15 for the year 1891, and that he had during all that time held said property by virtue of the deeds of the said Joseph P. Machebeuf and the Colorado Catholic Loan & Trust Association as described and set forth in the former answer of said defendants, said deeds being recorded in the office of the recorder of deeds of Arapahoe county, and by the possession of the said Morgan during all that time, to wit: from the 25th day of April, 1887, up until the 2nd day of September, 1892, and up until this time, through his grantees has been in the actual occupation and possession of
21 said property which occupation and possession were well known to the said city of Denver, and without let or hindrance on the part of the said city of Denver, and without any notice of any claim on the part of said city, and until the commencement of this suit, to wit, the 2nd day of September, 1892, and with full knowledge of said city of his claim in the said deed.

Wherefore this defendant and his grantees are entitled to be held and adjudged the legal owners of said premises in pursuance of the statutes in such case made and provided, and the said city of Denver is and ought to be estopped from asserting any claim, right or title to the said property.

TELLER, ORAHOOD & MORGAN,
Attorneys for Defendant, Samuel B. Morgan.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Samuel B. Morgan, being first duly sworn on his oath says: That he is the defendant making the foregoing answer; that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those he believes it to be true.

SAMUEL B. MORGAN.

Subscribed and sworn to before me this 14 day of January, 1896.

[SEAL.] CHARLES M. SPERRY,
Notary Public.

My commission expires January 21, 1897.

Indorsed: No. 2854. Circuit court. Platt Rogers, mayor etc., *vs.* Charles B. Wood *et al.* Amended answer, Samuel B. Morgan. Filed Jan. 21, 1896. Robert Bailey, clerk. Teller, Orahood & Morgan, attorneys for S. B. M.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court.

PLATT ROGERS, Mayor of the City of Denver, *et al.*, Complainants,
vs.
CHARLES L. WOOD, SAMUEL B. MORGAN, *et al.*, Defendants.
} No. 2854. Demurrer.

Comes now the complainants by F. A. Williams and G. Q. Richmond, their attorneys, and demurs to the answer of Samuel B. Morgan last filed herein, and for cause of demurrer says, that
22 the same is insufficient as an answer to the complaint for the following reasons:

I.

Because it does not appear from said answer that the defendant Morgan ever acquired legal title to the premises in controversy.

II.

Because it does not appear from said answer that the complainant or any of his predecessors or successors in office ever parted with the title to the premises in controversy.

III.

Because it does not appear from the said answer that the complainant or any of his predecessors in office had any legal right, authority or power, to convey the premises in controversy in the manner and form and by the various conveyances as alleged in said answer.

IV.

Because the conveyances in said answer relied upon to show title were not the conveyances of the complainant or any of his predecessors in office.

V.

That the acts and things set forth in said answer as constituting an alleged estoppel against the complainant were not the acts of the complainant or any of his predecessors in office.

VI.

That from all the allegations in said answer contained, it does not appear that the said defendant has ever acquired any right, title or color of title on account and by virtue of the payment of taxes on the premises in controversy.

VII.

That the said allegation- of the payment of taxes are wholly in-

sufficient in law as a defense to the matters and things alleged in the complaint.

F. A. WILLIAMS,
G. Q. RICHMOND,
Attorneys for the Complainant-.

Indorsed: No. 2854. In the U. S. circuit court, district of Colorado. Platt Rogers, mayor, etc., *vs.* Charles B. Wood *et al.* Demurrer to amended answer of Morgan. Filed Jan. 21, 1896. Robert Bailey, clerk. F. A. Williams and G. Q. Richmond, attorneys for complainant-.

23 Sixty-second Day, November Term, Tuesday, January 21st, A. D. 1896.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the 5th day of November, 1895.

PLATT ROGERS, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by George Q. Richmond Esq., his attorney, and the defendant S. B. Morgan by Willard Teller, Esq., his attorney, also comes.

And the demurrer of the plaintiff to the amended answer of the defendant S. B. Morgan, coming on now to be heard is submitted to the court and the court being now fully advised in the premises, it seemeth to the court now here that the said answer is not sufficient in law and so the said demurrer is sustained.

Wherefore, it is considered by the court that judgment be entered herein in favor of the plaintiff and against the defendant Samuel B. Morgan, for the possession of the premises in the complaint described and the said plaintiff's costs to be taxed.

UNITED STATES OF AMERICA, *ss:*

Seal United States Circuit Court of Appeals.

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Whereas, lately in the circuit court of the United States for the district of Colorado, before you, or some of you, in a cause between Platt Rogers, as mayor of the city of Denver, and The City of Denver, plaintiffs, and Charles B. Wood, Samuel B. Morgan, and others, defendants, wherein the judgment of the said circuit court, in said cause, entered on the 21st day of January, A. D. 1896, is in the following words, viz:

"On this 21st day of January, A. D. 1896, the same being one of the regular juridical days of the November term, A. D. 1895, of this

court, there being present the Honorable Moses Hallett, district judge,

It is considered by the court that the plaintiff do have and recover of and from the defendant possession of the property, lands and tenements in its complaint mentioned, described as follows, to wit, the south half of the northeast quarter of the southeast
24 quarter of section two (2) township four (4) south range sixty-eight (68) west in Arapahoe county, State of Colorado, and that it have a writ of possession therefor.

It is further considered by the court that the plaintiff do have and recover of and from the defendant Samuel B. Morgan its costs by it in this behalf laid out and expended to be taxed and have execution therefor."

as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the eighth circuit by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and ninety-six, the said cause came on to be heard before the said United States circuit court of appeals, on the transcript of record from said circuit court, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby reversed with costs; and that Samuel B. Morgan have and recover against Platt Rogers, as mayor of the city of Denver, and The City of Denver, the sum of one hundred three and 60/100 dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said circuit court with directions for further proceedings therein.

MARCH 1, 1897.

You therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this court, as according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Indorsed: 2854. United States circuit court of appeals. No. 839, December term, 1896. Samuel B. Morgan, plaintiff in error, *vs.* Platt Rogers, as mayor, etc., *et al.* Mandate. Filed May 17, 1897. Robert Bailey, clerk.

25 Tenth Day, May Term, Monday, May 15th, A. D. 1899.

Present: The Honorable John A. Marshall, district judge of the district of Utah, assigned to the district of Colorado, and other officers as noted on the second instant.

PLATT ROGERS, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esq., his attorney, and the defendants Ellen Theresa Morgan *et al.* by Willard Teller, Esq., their attorney also come.

And thereupon, on motion of Willard Teller, Esquire, attorney for defendants and pursuant to a mandate from the United States circuit court of appeals for the eighth circuit, it is ordered by the court that the demurrer to the amended answer of the defendant Samuel B. Morgan be and the same is hereby overruled.

It is further ordered by the court that the plaintiff reply to said amended answer within fifteen (15) days from this day.

26th Day, Saturday, June 3d, A. D. 1899.

Present: The Honorable Moses Hallett, district judge and other officers as noted on the second day of May last past.

PLATT ROGERS, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854

Action for possession of specific real property and damages.

At this day comes the plaintiff by S. L. Carpenter, Esquire, his attorney, and thereupon on his motion, it is ordered by the court that Henry V. Johnson, mayor of the city of Denver, be and he is hereby substituted as plaintiff in this cause, in the place of Platt Rogers, mayor of the city of Denver.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado,

In the Circuit Court of the United States in and for the District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, and THE City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD, SAMUEL B. MORGAN, ET AL., Defendants.

Replication to Amended Answer.

Now come the plaintiffs, and for replication to the amended answer of the defendant, Samuel B. Morgan,

26 Deny that the supposed deed of the city of Denver, by Francis M. Case, its mayor, of date February 6th, 1874, in said

amended answer set up, was made or executed or delivered to Joseph P. Machebeuf, the grantee named in said supposed deed, in pursuance of or in conformity to the recommendation or the vote of the city council of the city of Denver.

As to whether the defendant, Samuel B. Morgan, paid to the said Joseph P. Machebeuf as the purchase price of the property for the recovery of which this action is brought, the sum of twenty thousand dollars ($20,000.00), or any other sum of money, the plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs deny that at the date of said supposed payment, to wit: April 25th, A. D. 1877, or at any time the said Joseph P. Machebeuf, or the said The Colorado Catholic Loan and Trust Association, had any title whatsoever in said real property to convey to said Samuel B. Morgan.

As to whether or not said Samuel B. Morgan entered upon or into the possession of said real property under his said supposed deed from said Machebeuf, or the said supposed deed from the Colorado Catholic Loan & Trust Association, plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs admit that on the 10th day of June, A. D. 1887, the said Morgan filed a plat or map of said realty in the office of the clerk of Arapahoe county, Colorado, as alleged in said amended answer, but they deny that under or by virtue of said deeds from said Machebeuf or said Colorado Catholic Loan and Trust Association or either of them, the said Morgan acquired any color of title to the lands in controversy herein.

Plaintiffs deny that at any time between the 10th day of June, A. D. 1887, and the bringing of this action, or at any other time, the city of Denver caused to be levied upon said lots in said amended answer mentioned, or upon any of them, taxes for the years A. D. 1888, 1889, 1890 or 1891, or for either of said years, or that said city of Denver has ever at any time caused to be levied upon said lots or any of them any taxes whatsoever.

As to whether or not the said Samuel B. Morgan, because of his alleged ownership of said property, or for any other reason paid the several sums in said amended answer mentioned as having been paid as taxes, for the respective years last hereinbefore mentioned, these plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

27 Plaintiffs deny that in the year A. D. 1892, the city of Denver refused to allow any taxes to be levied on said property in controversy, or that any action whatever was taken by said city in respect to the levy of such taxes.

As to whether or not the said Samuel B. Morgan has been at all times, or at any time, ready or willing to pay in full the taxes upon said real property for the year A. D. 1892, and for subsequent years, or for any year, plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs deny that by reason of any of the matters or things in

said amended answer set up, the plaintiffs or either of them are estopped from asserting claim and title to said real property; and deny that by reason of any of the matters or things in said amended answer alleged, the defendant, Samuel B. Morgan, or his codefendants ought to be adjudged the legal owners of the real property in controversy herein. Deny that said Samuel B. Morgan, or his codefendants, or any of them, were at any time, or at the time of the beginning of this action, in possession of said property or any part thereof, in good faith, under and by virtue of color of title.

Plaintiffs deny that the supposed color of title of the defendant, Samuel B. Morgan, in said amended answer asserted and claimed, was made in good faith; and deny that said Morgan or any of his codefendants was or were in possession of said land for a period of five years subsequent to the first supposed payment of taxes thereon, until the beginning of this action. Deny that by reason of any of the matters or things in said amended answer asserted and claimed or set up the said Samuel B. Morgan or his grantees, or any of them, ought to be held or adjudged the legal owners of said premises or any part thereof, or that said plaintiffs or either of them is or ought to be estopped from asserting claim and title to said premises.

Wherefore, plaintiffs demand judgment as they have heretofore demanded in their complaint herein.

J. M. ELLIS.
S. L. CARPENTER.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

J. M. Ellis, being duly sworn, on his oath says that he is the attorney of the city of Denver. That he has read the foregoing replication and knows the contents thereof, and that the same is true to his best knowledge, information and belief.

J. M. ELLIS.

28 Subscribed and sworn to before me this 3rd day of June, A. D. 1899.

(My commission expires March 11, 1900.)

[SEAL.] ROBERT BAILEY, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

Indorsed: No. 2854. In U. S. circuit court. Henry V. Johnson, as mayor, *et al.*, plaintiffs, *vs.* Charles B. Wood *et al.*, defendants. Replication to amended answer. Filed Jun- 3, 1899. Robert Bailey, clerk. J. M. Ellis, S. L. Carpenter, attorneys for pl'ffs.

31st Day, Saturday, June 10th, 1899.

Present: The Honorable Moses Hallett, district judge and other officers as noted on the second day of May last past.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esq., his attorney, and the defendants Ellen Thomsa Morgan *et al.*, by Willard Teller, Esq., their attorney also come.

And the motion of the defendants for judgment on the pleadings herein coming on now to be heard is argued by counsel, and the court having considered the matter and being now fully advised in the premises,

It is ordered by the court for good and sufficient reasons to the court appearing that the said motion be and the same is hereby denied.

And thereupon on motion of plaintiff it is ordered by the court that he may file herein an amended replication within ten (10) days from this day.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States in and for the District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, and THE City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD, SAMUEL B. MORGAN, ET AL., Defendants.

Amended Replication to Amended Answer.

Now come the plaintiffs, and by leave of court first had and obtained file this their amended replication to the amended answer filed herein by said defendant, Samuel B. Morgan:

Deny that the supposed deed of the city of Denver, by Francis H. Case, its mayor, of date February 6th, A. D. 1874, in said
29 amended answer set up, was made or executed or delivered to Joseph P. Machebeuf, the grantee named in said supposed deed, in pursuance of or in conformity to the recommendation of the vote of the city council of the city of Denver, and deny that said supposed deed was or is the deed of the city of Denver.

As to whether the defendant, Samuel B. Morgan, paid to the said Joseph P. Machebeuf as the purchase price of the property, for the recovery of which this action is brought, the sum of twenty thousand dollars ($20,000.00) or any other sum of money, the plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs deny that at the date of said supposed payment, to wit: April 25th, A. D. 1887, or at any time, the said Joseph P. Machebeuf or the said The Colorado Catholic Loan and Trust Association had any title whatsoever in said real property to convey to said Samuel B. Morgan.

As to whether or not said Samuel B. Morgan entered upon or into the possession of said real property under his said supposed deed from said Machebeuf, or the said supposed deed from the Colorado Catholic Loan and Trust Association, plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs admit that on the 10th day of June, A. D. 1887, the said Morgan filed a plat or map of said realty in the office of the clerk of Arapahoe county, Colorado, as alleged in said amended answer, but they deny that under or by virtue of said deeds from said Machebeuf and said Colorado Catholic Loan and Trust Association or either of them, the said Morgan acquired any color of title to the lands in controversy herein.

Plaintiffs deny that at any time between the 10th day of June, A. D. 1887, and the bringing of this action, or at any other time, the city of Denver caused to be levied upon said lots in said amended answer mentioned, or upon any of them, taxes for the years A. D. 1888, 1889, 1890, or 1891, or for either of said years, or that said city of Denver has ever at any time caused to be levied upon said lots or any of them any taxes whatsoever.

As to whether or not the said Samuel B. Morgan because of his alleged ownership of said property or for any other reason, paid the several sums in said amended answer mentioned as having been paid as taxes, for the respective years last hereinbefore mentioned, these plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

30 Plaintiffs deny that in the year A. D. 1892, the city of Denver refused to allow any taxes to be levied on said property in controversy or that any action whatever was taken by said city in respect to the levy of such taxes.

As to whether or not the said Samuel B. Morgan has been at all times, or at any time, ready or willing to pay in full the taxes upon said real property for the year A. D. 1892, and for subsequent years, or for any year, plaintiffs have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiffs deny that by reason of any of the matters or things in said amended answer set up, the plaintiffs or either of them are estopped from asserting claim and title to said real property; and deny that by reason of any of the matters or things in said amended answer alleged, the defendant, Samuel B. Morgan, or his codefendants ought to be adjudged the legal owners of the real property in controversy herein. Deny that said Samuel B. Morgan or his codefendants, or any of them, were at any time, or at the time of the beginning of this action, in possession of said property, or any part thereof, in good faith, under or by virtue of color of title.

Plaintiffs deny that the supposed color of title of the defendant,

Samuel B. Morgan, in said amended answer asserted and claimed, was made in good faith; and deny that said Morgan or any of his codefendants was or were in possession of said land for a period of five years subsequent to the first supposed payment of taxes thereon, until the beginning of this action. Deny that by reason of any of the matters or things in said amended answer asserted and claimed or set up the said Samuel B. Morgan or his grantees, or any of them, ought to be held or adjudged the legal owners of said premises or any part thereof, or that said plaintiffs or either of them is or ought to be estopped from asserting claim and title to said premises.

Wherefore, plaintiffs demand judgment as they have heretofore demanded in their complaint herein.

J. M. ELLIS, *City Att'y,*
S. L. CARPENTER,
Att'ys for Plaintiffs.

STATE OF COLORADO, } ss:
County of Arapahoe, }

J. M. Ellis, being duly sworn, on his oath says that he is the attorney of the city of Denver. That he has read the foregoing amended replication and knows the contents thereof, and that the same is true to his best knowledge, information and belief.

J. M. ELLIS.

31 Subscribed and sworn to before me this 19th day of June, A. D. 1899.

My commission expires March 11, 1900.

[SEAL.] HENRY F. JOLLY,
Notary Public.

Indorsed: No. 2854. In U. S. circuit court. Henry V. Johnson, etc., *et al.*, plaintiffs, *vs.* Charles B. Wood *et al.*, defendants. Amended replication to amended answer. Filed Jun- 20, 1899. Robert Bailey, clerk. J. M. Ellis, S. L. Carpenter, attorneys for plaintiffs.

In the Circuit Court of the United States for the District of Colorado.

HENRY V. JOHNSON, as Mayor, etc., *et al.*, Plaintiffs, }
vs.
ELLEN THERESA MORGAN ET AL., Defendants. }

Demurrer to Amended Replication.

Now come the defendants herein, by Messrs. Teller & Orahood, their attorneys, and demur to the amended replication of the plaintiffs to the amended answer of Samuel B. Morgan, heretofore filed herein, and for grounds of demurrer show unto the court.

That said amended replication does not make or tender any issue

whatsoever and does not constitute any defense to the matters and things set up in said amended answer.

TELLER & ORAHOOD,
Attorneys for Defendants.

Indorsed: No. 2854. U. S. circuit court, district of Colorado. Henry V. Johnson, as mayor, &c., *et al. vs.* Ellen Teresa Morgan *et al.* Demurrer to amended replication. Filed Jun- 27, 1899. Robert Bailey, clerk. Teller & Orahood, attorneys for defendants.

Forty-seventh Day, May Term, Tuesday, July 11th, A. D. 1899.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the second day of May last past.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esq., his attorney, and the defendants by Willard Teller, Esq., their attorney, also come.

And the demurrer to the amended replication herein coming on now to be heard, is argued by counsel; and the court
32 having considered the matter and being now fully advised in the premises,

It is ordered by the court that said demurrer be and the same is hereby overruled.

In the Circuit Court of the United States, District of Colorado.

H. V. JOHNSON, as Mayor, etc., Plaintiff,
vs.
CHARLES B. WOOD ET AL., Defendants.

It is hereby stipulated and agreed that inasmuch as Samuel B. Morgan was in his lifetime the common source of title of all of the defendants, and inasmuch as the case has been heretofore tried on the answer of Samuel B. Morgan alone,

Now, therefore, it is hereby stipulated and agreed that the said answer heretofore filed by said Samuel B. Morgan shall stand as the answer of all of the defendant- herein, and that all parties shall be bound by the judgment herein, when rendered, the same as though all parties had answered.

J. M. ELLIS,
S. L. CARPENTER,
Attorneys for Plaintiff.
TELLER & ORAHOOD,
Attorneys for Defendants.

Indorsed: No. 2854. U. S. circuit court, dist. of Colo. H. V. Johnson, mayor, &c., *vs.* Ellen T. Morgan *et al.* Stipulation Answer Morgan to stand as answer of all defendants. Filed Nov. 22, 1899. Robert Bailey, clerk. J. M. Ellis, S. L. Carpenter, attorneys for pl'ff. Teller & Orahood, attorneys for defendants.

In the Circuit Court of the United States for the District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, and The City of Denver, Plaintiffs,
vs.
CHARLES B. WOOD ET AL., Defendants.

Given.

The counsel for plaintiffs requests the court to instruct the jury as follows:

You are instructed that the law of the case is with the plaintiffs and you will accordingly find a verdict in their favor and that they are entitled to the possession of the lands in controversy.

J. M. ELLIS AND
S. L. CARPENTER,
For Plaintiffs.

Indorsed: 2854. Johnson, mayor, etc., *vs.* Wood *et al.* Instructions given. Filed Nov. 28, 1899. Robert Bailey, clerk.

33 17th Day, Tuesday, November 28, A. D. 1899.

Present: The Honorable Moses Hallett, district judge, and other officers as noted on the seventh instant.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esquire, his attorney, and the defendants by Willard Teller, Esquire, their attorney, also come.

And thereupon the attorneys for the defendants suggest to the court now here the death of the defendant Samuel B. Morgan, and thereupon it is ordered by the court that Ellen Theresa Morgan, Alice Morgan Harrison, Jessie Morgan and Edward B. Morgan heirs-at-law of Samuel B. Morgan, deceased, be and they are hereby substituted as defendants in the place and stead of Samuel B. Morgan, deceased.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day comes the plaintiff by S. L. Carpenter, Esquire, his attorney, and the defendants by Willard Teller, Esquire, their attorney, also come.

And thereupon comes a jury, to wit:

William C. Davis,	Albert Sechrist,	James O. Patterson,
Orange B. Nichols,	Edward R. Hanley,	Milton H. Mack,
Richard Phillips,	Charles McArthur,	Gustave A. Schmidt,
Orville F. Shattuck,	Edward P. Phelps,	R. F. Pickets,

twelve good and lawful men, and they are duly selected and tried, empanelled and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And the said jurors having heard the evidence produced herein and the instructions of the court upon their oaths do say, they find the issues herein joined for the plaintiff, and that the plaintiff is the owner in fee and entitled to the possession of the premises in the complaint described, to wit: the south half of the northeast quarter of the southeast quarter of section two, township four, south of range sixty-eight west, in the county of Arapahoe in the State of Colorado.

34 Wherefore, it is considered by the court that the plaintiff do have and recover of and from the defendants possession of the property, lands and tenements set forth and described in the complaint and verdict of the jury, to wit: the south half of the northeast quarter of the southeast quarter of section two, township four, south of range sixty-eight west in the county of Arapahoe in the State of Colorado, and that he have a writ of possession therefor.

It is further considered by the court that the plaintiff do have and recover of and from the defendants his costs by him in this behalf laid out and expended to be taxed and have execution therefor.

TUESDAY, *November 28th, A. D.* 1899.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD, EDWARD P. SHAW, LEVERETT F. Englesby, Frederick J. Chamberlin, Trustee; James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, Trustee; Charles H. Brierly, Frank E. Harrington, Mary O. Rockwell, The Chamberlin Investment Company, a *Corporation; Margaretta G. Rice, Robert S.* Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, Trustee; C. H. Brierly, Trustee; S. Rose, Charles L. McIntosh, Trustee; James Nichols, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, Partners as McIntosh & Mygatt; Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, The City National Bank, a Corporation; Cyrus G. Richardson, and Ellen Theresa Morgan, Alice Morgan Harrison, Jessie Morgan, and Edward B. Morgan, Heirs of Samuel B. Morgan, Deceased. } 2854.

Action for possession of specific real property and for damages.

On this twenty-eighth day of November, A. D. 1899, the same being one of the regular juridical days of the November term, A. D. 1899, of this court, there being present the Honorable Moses Hallett, district judge.

It is considered by the court that the plaintiff do have and recover of and from the defendants possession of the property, lands and tenements set forth and described in the complaint and verdict of the jury, to wit: the south half of the northeast quarter of the southeast quarter of section two, township four, south of range sixty-eight in the county of Arapahoe in the State of Colorado, and that he have a writ of possession therefor.

35 It is further considered by the court that the plaintiff do have and recover of and from the defendants his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

Thirty-second Day, November Term, Wednesday, December 20th, A. D. 1899.

Present: Honorable Moses Hallett, district judge, and other officers as noted on the seventh day of November last past.

HENRY V. JOHNSON, as Mayor of the City of Denver,
vs.
CHARLES B. WOOD ET AL. } 2854.

Action for possession of specific real property and for damages.

At this day come the defendants Ellen Theresa Morgan *et al.* by Willard Teller, Esquire, their attorney, and thereupon on their

motion it is ordered by the court that bond on writ of error in this cause shall be in the sum of five hundred dollars ($500).

In the Circuit Court of the United States, District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, and THE City of Denver
vs.
ELLEN THERESA MORGAN ET AL.

Now come the said defendants Ellen Theresa Morgan and others and say that in the judgment and proceedings herein there are manifest errors, to wit:

1st. The court erred in overruling the demurrer of the said Ellen Theresa Morgan and others to the amended replication of the said plaintiff filed in this cause.

2nd. The court erred in holding that the plaintiff, the said Henry V. Johnson, as mayor of the city of Denver should or could be allowed or compelled to introduce in evidence the patent of the United States to Joseph E. Bates, as mayor of the city of Denver.

3rd. The court erred in refusing to instruct the jury at the request of the defendants' counsel to find the issues joined herein for the defendants.

4th. The court erred in holding that by the pleadings, the making and delivery of the deeds referred to and described in the defendants' answer were denied in the pleadings, and that defendants must show title by introducing such deeds in evidence.

5th. The court erred in excluding the deed marked Exhibit A, to wit, the deed a copy of which is set forth in the answer of
36 defendant in folios 27 and 28, being the deed of the city of Denver, by Francis M. Carr Case, to J. P. Machebeouf. Bill of exceptions, fol. —.

6. The court erred in refusing to receive in evidence deed from John J. Walley to J. P. Machebœuf. Bill of exceptions, fol. —.

7th. The court erred in refusing to receive in evidence the deed of J. P. Machebœuf to the Colorado Catholic Loan & Trust Association. Bill of exceptions, fol. —.

8th. The court erred in refusing to receive in evidence the deed of the Colorado Catholic Loan and Trust Association to Sam'l B. Morgan. Bill of exceptions, fol. —.

9th. The court erred in refusing to receive in evidence the deed of J. P. Machebœuf to Sam'l B. Morgan. Bill of exceptions, fol. —.

10th. The court erred in refusing to instruct the jury at close of *the* all the evidence offered by either party as requested by the defendants' counsel, said instruction being in writing in words and figures following, to wit:

"The court is asked to instruct the jury to find the issues joined herein (*for*), so far as joined on the right of property between plaintiff and defendant is concerned for the defendant."

11th. The court erred in instructing the jury at the request of plaintiffs' counsel, which instruction was in writing in words and figures following, to wit:

"You are instructed that the law of the case is with the plaintiffs, and you will accordingly find a verdict in their favor, and that they are entitled to the possession of the lands in controversy."

12th. The court erred in entering up judgment for the plaintiff, and in not entering up a judgment for the defendants.

Wherefore, by reason of the many and various errors hereinabove assigned, defendants pray that the said judgment may be reversed and held for naught.

Respectfully submitted.

TELLER & ORAHOOD,
Att'ys for Def'ts.

Indorsed: No. 2854. U. S. circuit court, district of Colorado. Henry V. Johnson, as mayor of Denver, pl'ff, *vs.* Morgan *et al.*, def'ts. Assignment of errors. Filed Dec. 23, 1899. Robert Bailey, clerk. Teller & Orahood, attorneys for def'ts.

37 UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States for the District of Colorado.

HENRY V. JOHNSON, as Mayor, etc., Complainant,
vs.
CHARLES B. WOOD ET AL., Respondents. } No. 2854.

Be it remembered, that on this 28th day of November, 1899, said cause coming on for trial, a jury being duly impanelled and sworn, the following proceedings were thereupon had, to wit:

The substitution of the name of Henry V. Johnson, as mayor in the place and stead of Platt Rogers, as mayor of the city of Denver, under which title the suit was formerly commenced.

It appearing to the court that Samuel B. Morgan, in whose name the answer heretofore filed was made, had deceased, it was ordered that the names of Theresa Morgan, Edward B. Morgan, Jessie —— (formerly Jessie Morgan), and Alice Harrison (formerly Alice Morgan), be substituted as the heirs of the said Samuel B. Morgan.

It further appeared that the said parties had made and entered into a stipulation in words and figures following, to wit:

In the Circuit Court of the United States, District of Colorado.

H. V. JOHNSON, as Mayor, etc., Plaintiff,
vs.
CHARLES B. WOOD ET AL., Defendants.

It is hereby stipulated and agreed that inasmuch as Samuel B. Morgan was in his lifetime the common source of title of all of the defendants, and inasmuch as the case has been heretofore tried on the answer of Sam'l B. Morgan alone,

Now, therefore, it is hereby stipulated and agreed that the said

answer heretofore filed by said Samuel B. Morgan shall stand as the answer of all of the defendants herein and that all parties shall be bound by the judgment herein, when rendered, the same as though all parties had answered.

(Sig.) J. M. ELLIS,
S. L. CARPENTER,
Att'ys for Pl'ff.

(Sig.) TELLER & ORAHOOD,
Att'ys for Def'ts.

38 And thereupon, the said defendants in the case admitted that Platt Rogers was, at the time of the institution of this action, mayor of the city of Denver, that his predecessor in office was Joseph E. Bates, and that Henry V. Johnson, the present plaintiff, is now the mayor of the city of Denver, and successor in office of said Joseph E. Bates.

Whereupon, the plaintiff (ordered) in evidence certified copy of the patent of the United States Government to Joseph E. Bates, as mayor of the city of Denver, covering the land in dispute.

Objection was made by counsel for defendants for the reason that the patent was set up *in hæc verba* in the answer of defendants; that the defendants, as well as the plaintiff, claim title through said patent and through deed from the city of Denver to Bishop Machebœuf, and from him to Samuel B. Morgan, and that the same having been set up in the answer, and not denied in the replication, there was no necessity for its introduction, and inasmuch as the questions arising under it had been passed upon by the court of appeals in the former case, and had thereby become the rule of law of this court.

Objection overruled; to which ruling of the court, defendants by their counsel then and there excepted.

Whereupon, the said patent was received and read in evidence.

This patent is set forth at folio 23 *et seq.* of answer of defendants, and for that reason is not further set forth.

Said patent having been received and read, plaintiff rested his case.

Thereupon defendants, by their counsel, moved the court in writing, in accordance with the rules of the said court, as follows:

In Circuit Court of the United States, District of Colorado.

HENRY V. JOHNSON, as Mayor City of Denver,
vs.
CHARLES B. WOOD ET AL.

The court is asked to instruct the jury to find the issues herein joined for the defendants.

And thereupon, the court overruled the motion, and stated as follows:

"Under the issues as they are now, the defendants must show their title; therefore the request for an instruction to find for the defendants must be overruled."

To which ruling of the court, defendants by their counsel then and there excepted.

39 Whereupon, defendants offered in evidence the following:

1. Deed of the city of Denver, by Francis M. Case, mayor, to Joseph B. Machebœuf, being deed set up *in hæc verba* in defendants' answer, and found in folio- 27 and 28 thereof, to which reference is made. Marked here Exhibit A.

To the introduction of this deed, plaintiff, by his counsel then and there objected.

Objection sustained by the court.

To which ruling of the court, defendants, by their counsel, then and there excepted.

Thereupon the court said: "I will hear the objections of counsel, to Exhibit A.

Mr. CARPENTER: As to the document marked A, if your honor pleases, purporting to be a quitclaim deed from the city of Denver by Francis M. Case, its mayor, to Right Rev. Joseph P. Machebœuf, bishop of Colorado, bearing date the 6th day of February, 1874——

The COURT: I do not understand the gentleman to be now offering that deed.

Mr. TELLER: I offered that and I supposed there was no objection to it.

Mr. CARPENTER: There is objection to it; I thought you were proceeding to offer all your documents so that the objections might be taken at one time. I desire to have now noted my objection to Defendants' Ex. A."

This document was the deed of the city of Denver above referred to, to Joseph P. Machebœuf, and found, as stated, at folios 27 and 28, of defendants' answer.

The plaintiff's counsel thereupon objected to the introduction of the deed for the reason that by reason of an act of the Congress of the United States, of date May 21st, 1872, entitled An act to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes, that the city of Denver and its mayor were without power or authority to convey the lands which were acquired by virtue of the act.

The act refered to *in* found set forth in full in fol. 23, of defendants' answer, to which reference *it* here made.

Plaintiff also objected to the introduction of the said deed for the further reason that "no ordinance or resolution of the city council of the city of Denver authorizing the conveyance Exhibit A, has been shown; and further the supposed deed does not conform to the recommendation of the committee to which the matter was sent and whose report was adopted.

Said counsel for plaintiff then admitted that the report as set forth in the answer was correct.

40 It was then stipulated by both parties that the journal of the city council in respect to the matter reads as follows:

"The committee on public grounds and buildings of the city of Denver, to whom was referred the petition of the Right Rev. Joseph

P. Machebœuf, bishop of the Roman Catholic church, submit the following report: Denver, Colorado Territory, Jan. 8th, 1874. To the honorable mayor and city council of the city of Denver. Gentlemen: Your committee all report they have examined the foregoing petition and would recommend the prayer of the petition be granted. J. M. Broadwell, W. J. Barker and Mitchell Benedict, committee. The ayes and noes called on motion to adopt the report—ayes, Anderson, Barker, Broadwell, Hartman, Maloney, Soggs, Webb and Moss. Noes, Casserman, McCune, McNamee; eight in the affirmative, three in the negative, carried."

Thereupon the court took the same under consideration until 3 o'clock; and at 3 o'clock, the court said:

The first and second objections made to the deed were overruled by the court of appeals, and of course the ruling of the court of appeals prevails upon this trial.

To the third objection, that the deed does not conform to the petition of Bishop Machebœuf, that seems to be well taken. In the petition to the city council the bishop described himself as the Catholic bishop of Denver, and after reciting that the ground in question was used by the Catholic church in Denver as a burial place, and that great numbers of their dead were therein buried, in the prayer for the deed, he asks that a conveyance be made to him as Catholic bishop, as aforesaid, and to his successors in office forever. The deed which was in fact made, was made to the Right Reverend Joseph P. Machebœuf, bishop of Colorado, in the county of Arapahoe and Territory of Colorado; does not describe him as the Catholic bishop of Denver, as he had requested, and it is made to him and to his heirs and assigns, and not to his successors in office. Under the circumstances, the petition disclosing the intention of the bishop to continue the use of the premises as a cemetery, there probably ought to have been some resolution or ordinance of the city prescribing the terms and conditions upon which the conveyance would be made. It seems that no such resolution or ordinance was passed, but only a vote approving or accepting the report of the committee. There are two reports of committees, one from M. D. Clifford and two others, and one from J. M. Broadwell and two others. The first is more specific than the last. That report is that the committee recommend that the prayer of the petition be granted, and the mayor in behalf of the city of Denver is authorized to make them their deed, provided they pay into
41 the city treasury the cost of the land, and which amounts are actually —, which the city of Denver has been to in obtaining government title. The next report is of the committee who examined the foregoing petition and would recommend that the prayer of the petitioner be granted. That was made at a later date from the first. Whether we take the first report or the second to be the one upon which the city council asked the approval of the petition, it would seem that under section 5 of the charter as it was then there should be an ordinance or resolution prescribing the terms upon which the deed would be made. Section 5 prescribes that the city may take and hold real estate, etc., and then its concluding para-

graph is, "And they shall have the power through and by the city council to sell and convey the same for the sole use and benefit of the inhabitants of said city." As the city council usually acts by resolution or ordinance it is probably true that such resolution or ordinance was necessary in this case. But if that be not true as to all cases, that is to say, if under this section of the charter (*of*) the city was authorized to make conveyances otherwise than by ordinance or resolution, it certainly was not true in this case, where the grant was to be made for a special purpose, and the conditions upon which it would be made needed to be specified. I think the third objection to the deed is well taken. The first and second objections are overruled by the authority of the court of appeals."

And said deed, Exhibit A, having been thus rejected, the defendants, by their counsel, then and there excepted to the ruling of the court.

And thereupon defendants offered in evidence a deed from Joseph P. Machebœuf to the Colorado Catholic Loan and Trust Association, covering the property in controversy, which was the deed dated March 31, 1885.

Objected to by plaintiffs' counsel, because no title was shown in the grantor.

Objection sustained by the court.

To which ruling of the court in excluding the said deed, defendants, by their counsel, then and there excepted.

And thereupon defendants offered deed by the Colorado Catholic Loan and Trust Association to Samuel B. Morgan, which deed bears date May 2nd, 1887, and described the property in controversy, to wit: the south half of the northeast quarter of the southeast quarter of section 2, township 4, south, range 67 west.

42 To which deed the same objection was made by plaintiffs' counsel that there was no title shown in the grantor.

Objection sustained by the court.

To which ruling of the court, in rejecting the said deed, defendants, by their counsel then and there excepted.

Defendants then offered deed of Joseph P. Machebœuf to Sam'l B. Morgan, of date May 25, 1887, for the exact land in controversy, which said deed is set forth in defendants' answer, at folios 31 and 32.

To which plaintiff by his counsel objected for the same reason.

Objection sustained by the court.

To which ruling of the court, in excluding the said deed, defendants, by their counsel, then and there excepted.

And this was all the evidence offered by either party.

And thereupon defendants rested.

And thereupon counsel for defendants submitted to the court a request for instructions in writing in words and figures as follows, to wit:

"In circuit court of the United States, district of Colorado. Henry V. Johnson as mayor of the city of Denver, *vs.* Chas. B. Wood and others. The court is asked to instruct the jury to find the issues

joined herein (*for*), so far as joined on the right of property between plaintiff and defendant is concerned, for the defendant.

But the court refused to give such instruction to the jury.

To which ruling of the court, defendants, by their counsel then and there excepted.

And thereupon, the court, at the request of plaintiffs, instructed the jury as follows, to wit:

"You are instructed that the law of the case is with the plaintiffs, and you will accordingly find a verdict in their favor, and that they are entitled to the possession of the lands in controversy."

To which instruction of the court, the defendants, by their counsel, then and there duly excepted.

And thereupon, the jury returned a verdict as follows, to wit:

"We, the jury in the above-entitled cause, find the issues herein joined for the plaintiffs, and that the plaintiffs are the owners in fee and entitled to the possession of the ground described in the complaint, to wit, the south half of the northeast quarter of the southeast quarter of section 2, township 4, south of range 68 west, in the county of Arapahoe and State of Colorado."

43 To which verdict, the defendants by their counsel then and there excepted.

And thereupon, the court ordered judgment for the plaintiff in accordance with the verdict.

To the entry of which judgment, in accordance with the verdict, defendants by their counsel then and there excepted.

And because the above matters and things do not fully appear of record herein, said defendants present this, their bill of exceptions, and pray that the same may be signed, sealed and made a part of the record herein.

Which is accordingly done.

MOSES HALLETT. [SEAL.]
—— ——. [SEAL.]

O. K.
S. L. CARPENTER.

Dated at Denver, Colorado, this 27th day of December, 1899.

Indorsed: No. 2854. United States circuit court, district of Colorado. Henry V. Johnson, as mayor, etc., pl'ff, *vs.* Charles B. Wood *et al.*, def'ts. Bill of exceptions. Filed Dec. 27, 1899. Robert Bailey, clerk. Teller & Orahood, attorneys for def'ts.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Circuit Court for the District of Colorado.

HENRY V. JOHNSON, as Mayor of the City of Denver, Plaintiff, }
vs. }
TERESA MORGAN, C. B. WOOD, and Others, Defendants. }

The clerk will make record in the above cause (*in the above*): 1, sum's and compl't; 2nd, amended answer; 3d, mandate C. C. of ap-

peals; 4, the replication and dem. thereto; 5, amended replication and dem.; (5), stipulation; 6, bill of ex. and 7, as'g't of errors. Make at once.

TELLER & ORAHOOD,
Attorneys for Def't.

To Robert Bailey, clerk.

Denver, Colorado, —— — 189–.

Indorsed: No. 2854. United States circuit court, for the district of Colorado. Johnson, mayor, etc., *vs.* Wood *et al.* Præcipe for transcript of record. Filed Dec. 27, 1899. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents, that we, Edward B. Morgan and William Church are held and firmly bound unto Henry V.
44 Johnson, as mayor of the city of Denver, in the full and just sum of five hundred (500) dollars to be paid to the said Henry V. Johnson, as mayor as aforesaid, his successors in office, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at the November term, A. D. 1899, of the circuit court of the United States, for the district of Colorado, in a suit pending in said court between Henry V. Johnson, as mayor of the city of Denver, *et al.*, plaintiffs, and Ellen Teresa Morgan *et al.*, defendants, numbered 2854, in said court, judgment was rendered against the said defendants and the said defendants having obtained a writ of error to the United States circuit court of appeals for the eighth circuit to reverse the judgment of said court and a citation directed to the said Henry V. Johnson, as mayor as aforesaid, citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Ellen Teresa Morgan *et al.*, defendants, shall prosecute said writ of error to effect, and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

EDWARD B. MORGAN. [SEAL.]
WILLIAM CHURCH. [SEAL.]

Sealed and delivered in presence of

—— ——.

Approved Jan. 6th, 1900.
MOSES HALLETT, *Judge.*

Justification.

STATE OF COLORADO, } ss:
County of Arapahoe, }

William Church one of the sureties on the within bond, being (*each*) first duly sworn deposes and saith that he is worth in real property in Colorado exempt from execution, the sum below set opposite his name, that is to say:

As to William Church five hundred dollars, over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

WILLIAM CHURCH.

45 Subscribed and sworn to before me at Denver this 22nd day of December, A. D. 1899.

My commission expires March 2, 1900.

[SEAL.] CLARENCE J. MORLEY,
Notary Public for Arapahoe County, Sate of Colorado.

Indorsed: Gen. No. 2854. Circuit court of the United States, district of Colorado. Henry V. Johnson, as mayor, etc., *vs.* Ellen Teresa Morgan *et al.* Bond on writ of error, $500. Filed this 6th day of January, A. D. 1900. Robert Bailey, clerk, by Charles W. Bishop, deputy clerk.

Writ of Error to United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1899, thereof, between Henry V. Johnson, as mayor of the city of Denver, plaintiff, and Ellen Teresa Morgan *et al.*, defendants, numbered 2854 in said court, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceed-

ings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 19th day of February 1900, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to
46 be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this sixth day of January, in the year of our Lord, one thousand nine hundred, and of the Independence of the United States the 124th year.

Seal United States Circuit Court, District of Colorado.

Issued at office in Denver, in said district, with the seal of the circuit court of the United States, for the district of Colorado, and dated as aforesaid.

ROBERT BAILEY,
Clerk Circuit Court United States, District of Colorado,
By CHARLES W. BISHOP,
Deputy Clerk.

Allowed by
MOSES HALLETT, *Judge.*

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable, the United States circuit court of appeals a duly certified transcript of the portion (—) the record and proceedings in the within-entitled case, described in the præcipe of counsel, together with all things concerning the same.

Seal United States Circuit Court, District of Colorado.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court of the United States, for the district of Colorado, at Denver, in said district, this 11th day of January, 1900.

ROBERT BAILEY, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

Gen. No. 2854. United States circuit court of appeals, eighth circuit. Ellen Teresa Morgan *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, mayor etc., defendant in error. Writ of error. To circuit court U. S. district of Colorado. Filed in United States circuit court district of Colorado, this sixth day of January, A. D. 1900. Robert Bailey, clerk, by Charles W. Bishop, deputy clerk. Teller & Orahood, attorneys for plaintiff in error.

47 *Citation on Writ of Error.*

U. S. Circuit Court of Appeals.

UNITED STATES OF AMERICA, *Eighth Judicial Circuit,* } *ss:*

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America to Henry V. Johnson, as mayor of the city of Denver, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, sitting at Denver, wherein Ellen Teresa Morgan and others are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this sixth day of January, A. D. 1900.

MOSES HALLETT, *Judge.*

Service copy of the within citation is hereby admitted this 6th day of January, 1900.

J. M. ELLIS AND
S. L. CARPENTER,
Att'ys of Def'ts in Error.

No. 2854. United States circuit court of appeals, eighth circuit. Samuel B. Morgan *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, mayor, etc., defendant in error. Citation. Filed in circuit court of the United States for the district of Colorado, this eighth day of January, A. D. 1900. Robert Bailey, clerk. By Charles W. Bishop, deputy clerk. Teller & Orahood, attorneys for plaintiffs in error.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to seventy-eight (78) both numbers inclusive, to be a true, perfect and complete transcript and copy of transcript from 2nd judicial district of the State of Colorado,
48 amended answer of defendant Morgan, demurrer to amended answer of Morgan, mandate, replication to amended answer,

amended replication to amended answer, demurrer to amended replication, stipulation, instructions given, assignment of errors, bill of exceptions, præcipe for record, judgment, and all orders of court subsequent to May 17, 1897, heretofore filed or entered of record in said court, and in a certain cause in said court lately pending, wherein Henry V. Johnson, as mayor of the city of Denver and The City of Denver were plaintiffs and Charles B. Wood, Edward P. Shaw, Leverett F. Englesby, Frederick J. Chamberlin, trustee, James Pickard, H. H. Bryant, T. M. Chapman, Humphrey B. Chamberlin, trustee, Charles H. Brierly, Frank E. Harrington, Mary C. Rockwell, The Chamberlin Investment Company, a corporation, Margaretta G. Rice, Robert S. Roeschlaub, Clara N. Bristol, Robert C. Fisher, Jennie C. B. Reynolds, William Church, Alfred W. Chamberlin, John R. Hanna, trustee, C. H. Brierly, trustee, S. Rose, Charles L. McIntosh, trustee, James Nichols, Silas C. Fulton, Charles L. McIntosh and William R. Mygatt, partners as McIntosh & Mygatt, Henry Hislop, William Sumner, James H. Williams, Horace W. Bennett, Julius A. Myers, The City National Bank, a corporation, Cyrus G. Richardson, and Ellen Theresa Morgan, Alice Morgan Harrison, Jessie Morgan and Edward B. Morgan, heirs of Samuel B. Morgan, deceased were defendants, as fully and completely as the same still remain on file or of record in my office at Denver.

Seal United States Circuit Court, District of Colorado.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this eleventh day of January, A. D. 1900.

ROBERT BAILEY, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

[Cancelled 10c. U. S. rev. stamp.]

Filed Jan. 15, 1900.

JOHN D. JORDAN, *Clerk.*

49 (*Appearance for Plaintiffs in Error.*)

And on the nineteenth day of January, A. D. 1900, an appearance of counsel for the plaintiffs in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor of the City of Denver. } No. 1381.

The clerk will enter my appearance as counsel for the plaintiffs in error.

WILLARD TELLER.
H. M. ORAHOOD.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1381. Ellen Teresa Morgan, *et al.*, pl'ffs in error, *vs.* Henry V. Johnson, as mayor of the city of Denver. Appearance. Filed Jan. 19, 1900, John D. Jordan, clerk. Willard Teller, H. M. Orahood, counsel for pl'ffs in error.

(*Appearance for Defendant in Error.*)

And on the fourteenth day of February, A. D. 1900, an appearance of counsel for the defendant in error was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor, etc. } No. 1381.

The clerk will enter my appearance as counsel for the defendant in error.

S. L. CARPENTER.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1900. No. 1381. Ellen Teresa Morgan, *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, as mayor, etc. Appearance. Filed Feb. 14, 1900, John D. Jordan, clerk. S. L. Carpenter, counsel for def't in error.

50 (*Appearance for Defendant in Error.*)

And on the fourteenth day of February, A. D. 1900, an appearance of Mr. J. M. Ellis, as counsel for the defendant in error, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor, etc. } No. 1381.

The clerk will enter my appearance as counsel for the defendant in error.

J. M. ELLIS.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1900. No. 1381. Ellen Teresa Morgan, *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, as mayor, etc. Appearance. Filed February 14, 1900, John D. Jordan, clerk. J. M. Ellis, counsel for def't in error.

(*Appearance for Defendant in Error.*)

And on the twenty-eighth day of November, A. D. 1900, an appearance of Mr. Tom Herrington as counsel for the defendant in error, was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor, &c. } No. 1381.

The clerk will enter my appearance as counsel for the defendant in error.

TOM HERRINGTON.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1381. Ellen Teresa Morgan, *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, as mayor &c. Appearance. Filed Nov. 28, 1900, John D. Jordan, clerk. Tom Herrington, counsel for def't in error.

51 (*Order of Submission.*)

And on the thirtieth day of November, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

FRIDAY, *November* 30, 1900.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor, &c. } No. 1381.

In error to the circuit court of the United States for the district of Colorado.

This cause having been called for hearing in its regular order, the same was argued by Mr. Willard Teller in behalf of the plaintiffs in error and by Mr. Tom Herrington for the defendant in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-eighth day of January, A. D. 1901 an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

52 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1900.

ELLEN THERESA MORGAN ET AL., Plaintiffs in Error, *vs.* HENRY V. JOHNSON, as Mayor of the City of Denver, Defendant in Error.	No. 1381. In Error to the Circuit Court of the United States for the District of Colorado.

Mr. Willard Teller (Mr. Harper M. Orahood was with him on the brief) for plaintiffs in error.

Mr. Tom Herrington (Mr. J. M. Ellis, Mr. S. L. Carpenter and Mr. Guy Le Roy Stevick were with him on the brief) for the defendant in error.

Before Caldwell and Thayer, circuit judges, and Adams, district judge.

This was a suit in ejectment instituted in 1892 by Platt Rogers, as mayor of the city of Denver, against Samuel B. Morgan and some forty other persons, grantees of Morgan, for the possession of the south half of the northeast quarter of the southeast quarter of section two, township four, range sixty-eight west, in Arapahoe county, Colorado. In the progress of the cause Henry V. Johnson, present mayor of Denver, and defendant in error herein, was substituted for Platt Rogers, and, by stipulation, the answer of Samuel B. Morgan was made to stand as the answer of all other defendants. On the death of Samuel B. Morgan, Ellen Theresa Morgan, the present leading defendant, and the other heirs-at-law of Samuel B. Morgan, now plaintiffs in error, were substituted as defendants in his place and stead.

The cause was first tried on demurrer to the answer and resulted in a judgment in favor of the plaintiff for the possession of the land in controversy. A writ of error was sued out and the cause brought to this court for review.

On March 1, 1897, the judgment of the trial court was reversed and the cause remanded for further proceedings in accordance with the opinion rendered. *Morgan v. Rogers*, 25 C. C. A. 97.

53 After the cause was so remanded, plaintiff filed a replication to the answer and afterwards filed an amended replication upon which the cause went to trial.

The facts appear sufficiently stated in the former opinion of this court, and the conclusion there reached was: that by virtue of the acts of Congress and the patent of November 15, 1873, referred to in the opinion, the city of Denver acquired an unconditional title in fee-simple absolute to a tract of land including that now in controversy; and that notwithstanding the act of Congress, in question, authorized the city of Denver to make an entry of the land "to be held and used as a burial place for the said city and vicinity," the patent issued, granted to the city such title in fee-simple without

condition as enabled the city to sell and dispose of the land unconditionally, for any purpose deemed by it desirable.

The defendants below claimed in their answer that the city of Denver having such unconditional fee, on February 6, 1874, conveyed the land in question to Joseph P. Machebeuf, and that on April 25, 1887, Machebeuf conveyed the same to Samuel B. Morgan, the defendants' grantor; and this court held in its former opinion that if such were the facts, the title to the lands in question was well vested in Morgan.

The amended replication filed by plaintiff joined issue on certain averments of the answer, relating to assessments of the land in question for city taxes, and the payment of such taxes by Morgan after he acquired title in 1887, and affirmatively pleads that the deed made by the mayor to Machebeuf, on February 6, 1874, was not made or executed pursuant to or in conformity with any vote of the city council of the city of Denver. The balance of the replication, when properly construed, questions the legal sufficiency of the other facts set up in the answer but does not deny the facts as stated.

At the trial below the plaintiff offered in evidence the patent of the United States to Joseph E. Bates, as mayor of Denver, of date November 15, 1873, and rested. The defendants, after an unavailing motion for an instructed verdict, offered in evidence the deed of the city of Denver, by Francis M. Case, mayor, to Joseph P. Machebeuf, of date February 6, 1874. Plaintiff objected to the introduction of this deed and assigned the following reasons therefor: "That by reason of the act of Congress of the United States of date May 21, 1872, entitled An act to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes, the city of Denver and its mayor were without power and authority to convey the lands which were acquired by virtue of the act;" and the further reason "that no ordinance or resolution of the city council of the city of Denver authorizing the conveyance has been shown," and further that "the supposed deed does not conform to the recommendation of the committee to which the matter was sent and whose report was adopted."

For the purpose of a ruling on these objections, it was admitted by counsel that a certain report of proceedings before the city council, as set forth in the answer, and further stated in the admission, was correct. These papers will be referred to later in the opinion. The trial court disapproved of the first and second grounds of objection, but sustained the third, namely, that the deed offered
54 did not conform to the recommendation of the committee to which the matter was sent and whose report was adopted, and excluded the deed.

Other deeds were offered in evidence by the defendants conveying Machebeuf's title to Samuel B. Morgan. Plaintiff's counsel objected to these deeds on the sole ground that Machebeuf was not shown to have title. The trial court sustained these objections and due exceptions were saved by the defendants to such rulings.

This statement reduces the case, in its broadest aspect, irrespective of the reasons given by the court below for its actions, to the follow-

ing questions: First, whether the city of Denver, in view of the supposed condition alleged to have been created by the use of the words in the act of 1872 "to be held and used as a burial place for the said city and vicinity," had power to convey the lands in question without regard to the condition? Second, whether there was any resolution or other authority granted by the city council to sell the lands in question to Machebeuf? And third, whether the deed actually made to Machebeuf conformed to the resolution or authority granted, if any, by the city council?

ADAMS, district judge, after stating the case as above, delivered the opinion of the court:

The decision of this court rendered on the first writ of error, *Morgan v. Rogers, supra*, is the law of this case. That decision was: that the act of Congress of May 21, 1872, did not operate to annex any condition to the grant authorized by it and that the patent to Bates, as mayor, in trust for the city of Denver, and to his successors and assigns forever, created only a naked, passive trust, under which the entire beneficial use, possession and control vested at once and absolutely in the city of Denver. That decision satisfactorily and conclusively settled the question that the city of Denver had the right and power to convey the land in question to Machebeuf, and notwithstanding the elaborate re-argument of this question by counsel, no further consideration will now be given to it. *Balch v. Haas*, 36 U. S. Appeals 693 and cases there cited.

The only remaining question is whether the city of Denver did convey the land to Machebeuf.

That it recognized a highly meritorious and equitable claim of Machebeuf; that it received the agreed consideration from him therefor; that it undertook to execute a deed to perform its equitable as well as legal obligation; that it permitted the bishop and his grantees to take possession of the land and exercise rights of ownership and control for a period of eighteen years, or more, before it questioned their title, cannot be gainsaid or questioned.

Under such circumstances an insurmountable legal necessity must be found by this court to induce it to disturb the defendant's possession. What is claimed to be that necessity? Substantially stated, it is this: that there was no resolution of the city council authorizing the conveyance to Machebeuf, and that the deed, as made, fails to conform to the resolution claimed to have been adopted.

It appears that on October 28, 1872, Joseph P. Machebeuf, who, as stated by the answer and not denied in the replication, was the bishop of the Catholic church for the diocese of Denver, pre-
55 sented a petition to the mayor and common council of that city in words and figures as follows:

"To the honorable the mayor and common council of the city of Denver:

"Your petitioner, Joseph P. Machebeuf, Catholic bishop of Denver, respectfully represents to your honorable body on his own behalf and on that of the Catholic church of Denver and Arapahoe

county, that some time in the year 1863 he purchased for the sum of $200 from one John I. Walley, the following-described piece of land situate in said county of Arapahoe, viz., the N. E. ¼ of the S. E. ¼ of sec. 2, T. 4, S. R. 68 W.; and that from the time of said purchase and since hitherto said piece of land has been used and still is used by the members of said Catholic church of Denver and Arapahoe county as a burial place, and that a great number of their dead are therein buried. And your petitioner further represents that having been informed that the city of Denver has procured from the Government of the U. S. a patent of a certain piece of land including the piece hereinbefore described to be used as a cemetery, he fears some measures may be taken by your honorable body to lay out and arrange the entire piece of land conveyed as aforesaid to the city of Denver, whereby the disposition and arrangement of said piece hereinbefore described might be greatly disturbed and interfered with to the detriment of the said members of the Catholic church in regard to the said land so used by them as a place of burial;

Wherefore your petitioner humbly prays that your honorable body may instruct a good deed of conveyance to be made on the part of said city of Denver by whomsoever is lawfully empowered in granting and conveying the fee of said piece of land hereinbefore described unto your petitioner as Catholic bishop aforesaid and to his successors in office forever, and your petitioner will ever pray, etc.

Denver, Oct., 28, 1872.

JOSEPH P. MACHEBEUF,
Bishop of Denver,
By EDWARD L. JOHNSON,
His Att'y-in-fact."

Such proceedings were afterwards had on that petition that on the 4th day of December, 1873, the committee which had been appointed for that purpose reported to the common council of the city of Denver and to the mayor thereof in words and figures following:

"To the honorable mayor and council:

"Your committee find on examination that within parties had rights previous to the city and would recommend that the prayer of the petitioner be granted and the mayor in behalf of the city of Denver is authorized to make them their deed provided they pay into the city treasury the cost of the land and which means all actual (—) which the city of Denver has been to in obtaining Government title, all of which is respectfully submitted."

Afterwards, and on the 8th day of January, 1874, the committee on public grounds and buildings for the city of Denver, to whom said petition had been referred, reported in the words following:

"The committee on public grounds and buildings of the city of Denver, to whom was referred the petition of the Right Rev. Joseph

P. Machebœuf, bishop of the Roman Catholic church, submit the following report: Denver, Colorado Territory, Jan. 8th, 1874. To the honorable mayor and city council of the city of Denver.
56 Gentlemen: Your committee all report they have examined the foregoing petition and would recommend the prayer of the petition be granted."

The journal of the city council shows that a motion was made to adopt the report of the committee, and that the motion was carried by a vote of eight in the affirmative to three in the negative, and it further appears, by the uncontradicted averments of the answer, that in pursuance of said recommendation and vote of the city council, the mayor, on February 6, 1874, executed and delivered a deed to Joseph P. Machebeuf in words and figures as follows:

"This deed made this 6th day of February, A. D. 1874, between the city of Denver, by Francis M. Case, its mayor, in the county of Arapahoe and Territory of Colorado, of the first part, and the Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, of the county of Arapahoe, Territory of Colorado, of the second part, witnesseth, that the said party of the first part for and in consideration of the sum of fifty dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed and quitclaimed and by these presents does remise, sell, convey and quitclaim unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, claim and demand which the said party of the first part has in and to the following-described real estate situate, lying and being in the county of Arapahoe, and Territory of Colorado, to wit: the southwest quarter of section two, township four south of range 68, west. This deed is made by order of the city council of the city of Denver.

"To have and to hold the same together with all and singular the appurtenances and privileges thereto belonging, or in anywise appertaining, and all the estate, right, title, interest and claim whatsoever of the said party of the first part either in law or equity to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever, for the purposes aforesaid.

"In witness whereof the said party of the first part by Francis M. Case, its mayor, has hereunto set hand and seal the day and year above written.

"(Signed) THE CITY OF DENVER, [SEAL.]
"By FRANCIS M. CASE,
"*Mayor of Denver.*"

This deed was duly acknowledged on the day of its date, and afterwards, on February 7, 1874, was duly recorded in the appropriate land records for Arapahoe county.

Addressing ourselves now to the first of the remaining objections to the deed to Machebeuf, inquiry must be made whether there was any ordinance or resolution of the city council authorizing the execution of the deed. The petition of the bishop was addressed to the common council of the city of Denver, the duly constituted body

through and by which the city under its organic law alone could exercise the power conferred upon it to sell and convey its real estate. Sections 4 and 5, city charter of 1866.

After setting forth fully his equitable claim to the lands in question, the bishop closes his petition with the prayer "that your honorable body may instruct a good deed of conveyance to be made on the part of the said city of Denver by whomsoever is law-
57 fully empowered, granting and conveying the fee of said piece of land hereinbefore described unto your petitioner as Catholic bishop as aforesaid" * * * etc.

This petition was first referred to a special committee which speedily reported that the bishop and his church had rights superior and antecedent to those of the city and "recommended that the prayer of the petition be granted" on certain terms, which, for the present purpose, it is unnecessary to repeat. Soon thereafter, for reasons unexplained, the bishop's petition was referred to the committee of the council "on public grounds and buildings." This committee soon reported that they had examined the petition and recommended that "the prayer of the petition be granted."

The prayer of the petition, so referred to, is thus effectually incorporated in the committee's report, and this report as submitted to the council became, in effect, a recommendation that the council direct a good and sufficient deed to be made conveying the land referred to in the bishop's petition to him as such bishop.

The record shows that there was a motion to adopt that report, and that such motion was duly carried. This in our opinion constitutes direct and sufficient authority emanating from the city council for the conveyance in question. The objection that this authorization was made by motion, instead of by formal resolution or ordinance, is without merit. The city council was empowered by law to act for the city in selling and conveying its property and there was no requirement that its action should be by ordinance.

This court said in *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271: "It is common learning that where a statute authorizes action by the legislative body of a city, and does not require such action to be taken by ordinance, it may be taken by a vote upon a motion or by the passage of a resolution." In support of this proposition a large number of cases are cited.

The trial court applied this view of the law and properly overruled plaintiff's objection to the introduction of the deed for want of authorization.

The only remaining question is whether the deed actually made to Machebeuf conformed to the recommendation and report of the committee so adopted by the city council.

It is argued by counsel for the city that if the deed had corresponded to the prayer of the bishop's petition, as recommended by the committee to the council, the grant would have been made to "Joseph P. Machebeuf, Catholic bishop of Denver, and to his successors in office forever." It is further argued that the petition of the bishop as submitted to the council clearly discloses that he claimed the land for his church, and desired a conveyance to him for that

church, but that, contrary to the recommendation of the committee as adopted by the council, and in violation of the trust disclosed in the petition, the deed as executed actually named as grantee the "Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, party of the first part, with the *habendum clause*, thus: 'To have and to hold all and singular' * * * etc. 'to the only proper use, benefit and behoof of the said party of the second part, his *heirs* and *assigns* forever for the purposes aforesaid.'"

This objection to the deed based on the grounds assigned, or either of them, is, in our opinion, without merit. Let it be conceded
58 that the bishop requested a deed to him as trustee for his church, and that the city authorized the execution of a deed for that purpose.

It is familiar doctrine that the trust need not necessarily be stated in the deed.

A declaration of trust may be contained in a different instrument from that by which the estate is vested in the trustee. Bispham's Principles of Equity, 5th edition, section 65.

The trust under which the bishop was to hold the land was distinctly declared in the petition signed by him and addressed to the city council. It was referred to in the report of the committee and in the adoption of that report by the council. It was distinctly recognized in the deed itself. The title was vested in Joseph P. Machebeuf, his heirs and assigns "for the purposes aforesaid." A careful examination of the deed as made discloses that the words last quoted must necessarily relate to his office named in the deed as bishop of Colorado; in other words, the title as disclosed in the deed is vested in Machebeuf for the purposes of his bishopric.

It is next objected that the *habendum clause* of the deed in question runs to the party of the second part, "*his heirs and assigns forever*" instead of to him and "his successors in office forever," as stated in the petition to the city council. We think this objection overlooks the essential purpose to be accomplished by the deed. That was to convey an indefeasible estate in fee-simple to the trustee. The apt and usual words for that purpose were employed, namely, to him, "his heirs and assigns forever." The "heirs and assigns" here mentioned are not words of purchase but of limitation and any title which might thereafter be devolved upon them would be subject to the same trust as was created by the deed, in the first taker.

It is next objected that the deed was made to the "Rt. Rev. Joseph P. Machebeuf, bishop of Colorado," instead of "Joseph P. Machebeuf, bishop of Denver." From what has already been said, it appears that the purpose of the grant was to convey the property in question to Machebeuf, in trust for his bishopric, as disclosed in his petition to the city council. The fact, if it be a fact, that his true title is "Catholic bishop of Denver," cannot avail to defeat the conveyance to him by his proper name, even though his office may have been inaccurately stated. The only effect of such inaccuracy would be to possibly create some uncertainty as to the beneficiaries under the trust; but this possibility is greatly minimized, if not totally ex-

tinguished by the clear declaration of trust found in contemporaneous and antecedent documents. So far as the city of Denver is concerned this criticism of the deed, in our opinion, may be conclusively answered by the suggestion that the language criticised is nothing but *descriptio personæ* and even if inaccurate, there is abundant left to clearly fix the identity of the intended grantee.

In our opinion there is no such discrepancy between the authority conferred and the authority executed as to impair the deed in question.

It follows from the foregoing that Joseph P. Machebeuf acquired good title to the lands in question from the city of Denver, and as the only objection to the other deeds offered in evidence conveying the land from Machebeuf to the defendants was want of title in Machebeuf, such objections should have been overruled and the deeds admitted.

59 We refrain from expressing any opinion on the question argued at the bar as to whether the deed from the city of Denver to Machebeuf was executed by the proper officer or agent of the city, because no such question was raised at the trial below. No objection was made to the introduction of the deed to Machebeuf because of any irregularity in its execution and no assignment of error presents any such question for consideration. We have also not deemed it necessary to pass upon several assignments of error relating to the pleadings or proceedings at the trial, preferring rather to dispose of the case on its merits.

It follows from the conclusions reached, and already stated, that the trial court erred in excluding the deeds offered in evidence by defendants and for that reason the judgment must be reversed.

This cause has now been twice before this court and we have given all phases of it our most serious attention and consideration and the conclusions reached and settled by our deliberate judgments on the two writs of error are: that the city of Denver had the power to convey the land in controversy to Machebeuf, and that it did so. The deeds offered in evidence at the last trial show that Machebeuf has conveyed the lands so acquired by him to the defendants in this case.

A careful scrutiny of the record shows but one possible issue that might again be submitted to the trial court and that is: whether the city of Denver properly executed the direction of the city council to convey the land in controversy to Machebeuf; in other words, whether the proper agent or officer of the city executed the deed.

The facts disclosed by the unchangeable written proof, found in the record, conclusively show that Machebeuf claimed an equitable right to the land in controversy; made his claim known to the city of Denver; secured an effectual authorization by the city council for a conveyance to him; paid an agreed consideration therefor and received the deed which in terms recites that it "is made by order of the city council of the city of Denver."

If, for any reason, the culminating act of executing the deed was irregularly performed; that is to say, if the deed should have been executed by a commissioner appointed by the city council, as claimed

in argument by counsel, instead of by the mayor of the city as done, it was such a mistake or oversight, in no manner disturbing the fixed rights of the parties, as can be readily corrected by an appropriate equitable proceeding. Inasmuch as a further trial at law of this sole remaining issue could undoubtedly be enjoined until such equitable proceedings could be had, we perceive no reason for remanding this cause for a further trial. The controversy has been pending between the parties for nine years, and during that time all the substantial and meritorious questions of difference between them have been settled. It would avail nothing to pursue the litigation further. The judgment is therefore reversed and the cause remanded to the trial court with directions to enter judgment in favor of the defendants.

Filed January 28, 1901.

60 (*Judgment.*)

And on the twenty-eighth day of January, A. D. 1901, in the record of the proceedings of said circuit court of appeals, is a judgment in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1900.

MONDAY, *January* 28, 1901.

ELLEN TERESA MORGAN and Others, Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor of the City of Denver. } No. 1381.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, reversed with costs; and that Ellen Teresa Morgan and others, plaintiffs in error, have and recover against Henry V. Johnson, as mayor of the city of Denver the sum of one hundred twelve and $\frac{80}{100}$ dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be and the same is hereby remanded to the said circuit court with directions to enter a judgment in favor of the defendants.

January 28, 1901.

(*Petition for Substitution of Party.*)

And on the twenty-first day of June, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, a petition for substitution of party, in words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
61 HENRY V. JOHNSON, as Mayor of the City of Denver, and The City of Denver, a Municipal Corporation, Defendants in Error.

Petition for substitution.

To the honorable judges of the United States circuit court of appeals, eighth circuit:

Counsel for the defendants in error respectfully show to the court that on the second day of April, 1901, a municipal election was held in the city of Denver, State of Colorado, pursuant to the laws of the said State, resulting in the election of Robert R. Wright, Jr., to the office of mayor of the said city, to succeed the Honorable Henry V. Johnson. That the Honorable Henry V. Johnson was the mayor of the city of Denver at the time when the decision in the above-named cause was rendered by this honorable court, on the 28th day of January, 1901. That the Honorable Robert R. Wright, Jr., qualified as the mayor of the city of Denver on the 9th day of April, 1901. That as the mayor of the city of Denver is the real party defendant in the above-entitled cause, your petitioners respectfully pray that the Honorable Robert R. Wright, Jr., may be substituted for the Honorable Henry V. Johnson as mayor of the city of Denver, defendant in error, and that the Honorable Robert R. Wright, Jr., mayor of the city of Denver, may be made a party of record in this honorable court for the purpose of presenting a petition for writ of error to the Supreme Court of the United States of America.

Respectfully presented.

PLATT ROGERS,
HALSTED L. RITTER,
Attorneys for Defendants in Error.

(Endorsed:) 1381. U. S. circuit court of appeals, eighth circuit. Ellen Teresa Morgan *et al.*, plaintiffs in error, *vs.* Henry V. Johnson, as mayor of city of Denver, and The City of Denver, defendants in error. Petition for substitution. Filed Jun- 21, 1901, John D. Jordan, clerk. H. M. Orahood attorney for defendants in error.

(*Order for Substitution of Party.*)

And on the twenty-third day of September, A. D. 1901, in the record of the proceedings of the United States circuit court of appeals, is an order for substitution, in words and figures following, to wit:

62 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1901.

MONDAY, *September* 23, 1901.

ELLEN TERESA MORGAN ET AL., Plaintiffs in Error,
vs.
HENRY V. JOHNSON, as Mayor of the City of Denver, and The City of Denver, a Municipal Corporation. } No. 1381.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard upon the motion of counsel for defendants in error for an order substituting Robert R. Wright, Jr., as mayor of the city of Denver, in the place and stead of Henry V. Johnson, as mayor, etc.

On consideration whereof, it is now here ordered by this court that said Robert R. Wright, Jr., as mayor of the city of Denver, be, and he is hereby, substituted as a defendant in error in the place and stead of Henry V. Johnson, as mayor of the city of Denver.

September 23, 1901.

(*Assignment of Errors.*)

And on the seventeenth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, an assignment of errors, in words and figures following, to wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

ELLEN THERESA MORGAN ET AL., Plaintiffs in Error,
vs.
ROBERT R. WRIGHT, JR., as Mayor of the City of Denver, Defendant in Error.

Assignment of errors.

Defendant in error in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon the hearing of said cause, to wit:

I. The court erred in overruling the judgment of the circuit court on the demurrer of the defendant in error to the answer of the plaintiffs in error to the complaint.

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II. The circuit court erred in entering an order overruling the demurrer of the defendant in error to the answer of the plaintiffs in error to the complaint, in accordance with the mandate of the circuit court of appeals.

III. The court erred in holding that the act of Congress of May 21st, A. D. 1872, entitled, "An act to enable the city of Denver to

purchase certain lands in Colorado for cemetery purposes," authorized the Government of the United States to convey to the mayor of the city of Denver title to the land in controversy in fee-simple.

IV. The court erred in holding that the act of June 25th, 1890, confirming and approving the patent to the land in controversy was issued and delivered by the Government of the United States under the terms and conditions of the act of Congress of May 21st, A. D. 1872.

V. The court erred in holding that the Government of the United States had, by the issuance of the patent to the land in controversy, parted with the absolute title to the same, and that Congress could not, by the act of June 25th, A. D. 1890, attach or annex other conditions, or further limit the use to which the land so patented might be devoted.

VI. The court erred in holding that under the act of Congress, to wit: the act of May 21, A. D. 1872, wherein and whereby it is provided that the land in controversy may be acquired by the city of Denver in trust for certain purposes, the said city of Denver or its officials could convey the title or part with any portion of said land for other and different purposes, or could part with the same at all.

VII. The court erred in holding that the patent of date November 15th, A. D. 1873, conveyed and vested the legal title to the land described and in controversy in the city of Denver, and not in Joseph E. Bates, the mayor of said city of Denver, and his successors in trust.

VIII. The court erred in holding that, although the grant by patent was in express terms to Joseph E. Bates, mayor, in trust for the city of Denver, and to his successors and assigns forever, that such trust so expressed in said patent, was a mere naked and passive trust, under which the entire beneficial use, possession and control vested at once and absolutely in the city of Denver.

64 IX. The court erred in holding that the city council of the city of Denver was not required to pass an ordinance or a resolution authorizing the conveyance of the land in controversy to Joseph P. Machebeuf.

X. The court erred in holding that the mayor of the city of Denver could make a valid and binding deed to Joseph P. Machebeuf, bishop of Colorado, on February 6th, 1874, under and by virtue of the adoption by the city council of the city of Denver of the report of the committee on grounds and buildings.

XI. The court erred in holding that when the city council of the city of Denver adopted the report of its committee on grounds and buildings which recommended that the prayer of the petition of Joseph P. Machebeuf, bishop of Denver, dated October 28th, 1872, wherein it is prayed that a deed of conveyance from the city to the said Machebeuf be made of the land in question, it was a sufficient authorization and power for the mayor of the city of Denver to make the deed.

XII. The court erred in holding that the city council of the city of Denver could, by the passage of a mere motion, authorize the

mayor of the city of Denver to make a deed to the land in question to Joseph P. Machebeuf, bishop of Colorado.

XIII. The court erred in holding that the deed to the land in controversy made by the city of Denver by Francis M. Case, mayor, was a valid deed.

XIV. The court erred in holding that the deed made to Joseph P. Machebeuf on February 6, 1874, conformed to the recommendation and report of the committee on grounds and buildings as adopted by the city council.

XV. The court erred in holding that the deed to "Right Reverend Joseph P. Machebeuf, bishop of Colorado," on the 6th of February, 1874, pursuant to the adoption of the report by the city council of its committee on grounds and buildings was valid when the said report recommended the deed to be made to "The Right Reverend Joseph P. Machebeuf, bishop of Denver."

XVI. The court erred in holding that the deed to "Right Reverend Joseph P. Machebeuf, bishop of Colorado," was a valid and binding deed, when the petition asks that the deed be made to "Joseph P. Machebeuf, Catholic bishop of Denver," and the committee of the city council recommended the deed to be made in accordance with the petition.

XVII. The court erred in holding that the deed of February 6th, 1874 to the "Right Reverend Joseph P. Machebeuf, bishop of Colorado," is a valid deed when the habendum clause of said deed runs to the party of the second part, "his heirs and assigns forever," instead of to the Right Reverend Joseph P. Machebeuf and "his successors in office forever," which latter was embodied in the petition of the said Machebeuf to the city council of Denver on October 28th, 1872.

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XVIII. The court erred in holding that Joseph P. Machebeuf acquired good title to the land in question from the city of Denver under and by virtue of the deed of February 6th, 1874.

XIX. The court erred in holding that the said Machebeuf could convey a good and sufficient title to said property to his grantees.

XX. The court erred in holding that the grantees of said Machebeuf have a good and sufficient title.

XXI. The court erred in holding that the trial court erred in excluding the deeds offered in evidence by the defendants.

XXII. The court erred in holding that the proper officer of the city of Denver made and executed the deed of February 6th, 1874 to Joseph P. Machebeuf.

XXIII. The court erred in reversing the judgment of the circuit court and directing that judgment be entered in the circuit court in favor of the plaintiffs in error.

XXIV. The circuit court erred in entering judgment for the defendants in accordance with the mandate of the circuit court of appeals.

PLATT ROGERS,
HALSTED L. RITTER,
Attorneys for Defendant in Error.

(Endorsed:) No. 1381. Supreme Court United States. Ellen Theresa Morgan, *et al.*, plaintiffs in error, *vs.* Robert R. Wright, Jr., as mayor of the city of Denver, defendant in error. Assignment of errors. Platt Rogers, attorney for defendant in error. Filed Oct. 17, 1901, John D. Jordan, clerk.

(*Petition for Writ of Error.*)

And on the seventeenth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a petition for writ of error, in words and figures following, to wit:

66 In the Supreme Court of the United States.

ELLEN THERESA MORGAN ET AL., Plaintiffs in Error, *vs.* ROBERT R. WRIGHT, JR., as Mayor of the City of Denver, Defendant in Error.	Petition for Writ of Error.

Comes now the above-named Robert R. Wright, Jr., as mayor of the city of Denver, defendant in error herein, and says that on or about the 28th day of January, 1901, the circuit court of appeals of the eighth circuit of the United States entered judgment herein in favor of the plaintiffs in error and against the defendant in error, in which judgment and proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant in error prays that the writ of error issue in his behalf to the United States circuit court of appeals of the eighth circuit for the correction of errors so complained of.

PLATT ROGERS,
Attorney for the Defendant in Error.

(Endorsed:) No. 1381. Supreme Court United States. Ellen Theresa Morgan, *et al.*, plaintiffs in error, *vs.* Robert R. Wright, Jr., as mayor of the city of Denver, defendant in error. Petition for writ of error. Filed Oct. 17, 1901, John D. Jordan, clerk. Platt Rogers, attorneys for defendant in error.

(*Bond on Writ of Error.*)

And on the seventeenth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a bond on writ of error, in words and figures following, to wit:

Know all men by these presents that we, the City of Denver, a municipal corporation under the laws of the State of Colorado, Robert R. Wright, Jr., mayor of the city of Denver, and Henry T. Rogers and Henry Youngs as sureties, are held and firmly bound unto

Ellen Theresa Morgan in the full and just sum of one thousand dollars ($1,000), to be paid to the said Ellen Theresa Morgan, her heirs, executors, administrators or assigns, to which payment
67 well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this fifth day of October in the year of our Lord one thousand nine hundred and one.

Whereas, lately, at the December term, A. D. 1900, of the circuit court of appeals of the United States, in and for the eighth judicial circuit, in a suit depending in said court between Ellen Theresa Morgan, plaintiff in error, and Henry V. Johnson, mayor of the city of Denver, and The City of Denver, defendants in error, a final decree of the said circuit court of appeals was rendered against the said Henry V. Johnson, mayor of the city of Denver, and the City of Denver, and the said Henry V. Johnson, mayor of the city of Denver, and the City of Denver, having obtained a writ of error to the Supreme Court of the United States of America, to reverse the said judgment of the said circuit court of appeals of the United States in the aforesaid suit, and a citation directed to the said Ellen Theresa Morgan, citing and admonishing her to appear and be in the Supreme Court of the United States at the city of Washington, D. C., sixty days from and after the date of this citation:

Now the condition of the above obligation is such that if the said Robert R. Wright, Jr., mayor of the city of Denver, who has heretofore, by order of the Supreme Court of the United States of America been substituted for and in the place of Henry V. Johnson, mayor of the city of Denver, and the City of Denver, shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

THE CITY OF DENVER,
By R. R. WRIGHT, JR., *Mayor.*

Attested by the undersigned with the corporate seal of the city of Denver.

[Seal of the City of Denver.]

(Signature illegible), *City Clerk.*
HENRY T. ROGERS.
HENRY YOUNGS.

Justification.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Henry T. Rogers and Henry Youngs sureties on the within
68 bond, being duly sworn, each for himself, deposes and says that he is worth, after paying his just debts, the sum of one

thousand dollars, exclusive of property exempt from execution by the laws of the State in which he resides.

HENRY T. ROGERS.
HENRY YOUNGS.

Subscribed and sworn to before me by the above-named Henry T. Rogers and Henry Youngs this 5th day of October, A. D. 1901. My commission expires Nov. 12th, 1904.

[SEAL.] WILLIAM A. REEF,
Notary Public.

Approved Oct. 12th, 1901.
DAVID J. BREWER, *Justice.*

(Endorsed:) No. 1381. In Supreme Court United States of America. Ellen Theresa Morgan *et al.*, plaintiffs in error, *vs.* Robert R. Wright, Jr., mayor of the city of Denver, and The City of Denver, defendants in error. Bond. Filed Oct. 17, 1901, John D. Jordan, clerk. Platt Rogers, attorney for defendants in error.

(*Writ of Error.*)

And on the seventeenth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a writ of error, the original of which, with the clerk's return thereon, is hereto attached and herewith returned.

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between Ellen Teresa Morgan *et al.*, plaintiffs in error, and Henry V. Johnson, as mayor of the city of Denver, defendant in error a manifest error hath happened, to the great damage of Robert R. Wright, Jr., as mayor of the city of Denver as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 12th day of October, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. —. Robert R. Wright, Jr., as mayor of the city of Denver, plaintiff in error, *vs.* Ellen Teresa Morgan *et al.* Writ of error. Filed Oct. 17 1901 John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof, I hereto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, Missouri, in the eighth circuit, this twenty-eighth day of October, A. D. 1901.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

70 (*Citation.*)

And on the twenty-fifth day of October, A. D. 1901, there was filed in the clerk's office of said circuit court of appeals, in said cause, a citation, the original of which, with admission of service endorsed thereon, is hereto attached and herewith returned.

71 UNITED STATES OF AMERICA, *ss:*

To Ellen Teresa Morgan *et al.*, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein Robert R. Wright, Jr., as mayor of the city of Denver, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 12th day of October, in the year of our Lord one thousand nine hundred and one.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. —. Robert R. Wright, Jr., as mayor of the city of Denver, plaintiff in error, *vs.* Ellen Teresa Morgan, *et al.* Citation. Filed Oct. 25, 1901. John D. Jordan, clerk.

Service of the within citation is hereby admitted this 19th day of October, 1901.

WILLARD TELLER,
Att'y for Def't in Error.

72 *Clerk's Certificate to Transcript.*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing seventy-two pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals in the case of Ellen Teresa Morgan, *et al.*, plaintiffs in error, *vs.* Robert R. Wright, Jr., mayor of the city of Denver, substituted for Henry V. Johnson, mayor of the city of Denver, defendant in error, December term, 1900, as full, true and complete as the same remain on file and of record in my office.

I further certify that on the thirtieth day of March, A. D. 1901, a mandate was issued out of the clerk's office of said circuit court of appeals, pursuant to the judgment of that court, directed to the circuit court of the United States for the district of Colorado.

I do further certify that the original writ of error, with clerk's return thereon, and the original citation with admission of service endorsed thereon, are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this twenty-eighth day of October, A. D. 1901.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18,319. U. S. C. C. of appeals, 8th circuit. Term No. 192. Robert R. Wright Jr., as mayor of the city of Denver, plaintiff in error, *vs.* Ellen Teresa Morgan *et al.* Filed November 18, 1901.